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VILLAGE OF OAK PARK, a Municipal Corporation,

[redacted]

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 194

ANGELINE DEBARTOLO,

Petitioner,

vs.

VILLAGE OF OAK PARK, A MUNICIPAL CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Justices of the Supreme Court of the United States:

Your petitioner Angeline DeBartolo, a widow, respectfully represents unto this Honorable Court that she is a citizen of the United States and a resident of the Village of Oak Park, County of Cook and State of Illinois, and is the owner of the property here involved known as 1181 South Lyman Avenue in said Village of Oak Park, Illinois.

The judgment here sought to have reviewed was entered by the Supreme Court of Illinois, the highest judicial tribunal of the said State.

The action in the trial court was for an injunction to restrain said Village of Oak Park from enforcing certain

provisions of its zoning ordinance as against petitioner and her property.

The trial court decreed that the provision of the ordinance challenged, was, as applied to petitioner's property, arbitrary and unreasonable and therefore, unconstitutional and void.

The trial court certified that the validity of an ordinance was involved and appeal was taken directly to the Supreme Court of Illinois.

The Supreme Court of Illinois reversed the decree of the trial court, holding that the enforcement of said zoning ordinance, as applied to petitioner's property, did not deprive her of her constitutional rights.

Summary Statement of the Matter Involved

The zoning ordinance in question was enacted by the Village of Oak Park in 1921 and placed petitioner's property in a one-family residence zone. The building as it now exists was then on the property.

A family as defined by said ordinance is "any number of individuals living and cooking together as a single housekeeping unit".

The building was so designed and constructed that its second floor would approximate the floor space of the first floor, and the head room of the second floor due to the roof structure, would approximate that of the first floor (See pictures Transcript pages 49 and 55).

When constructed, the interior of the second floor was not completely finished. The builder finished only one front room upstairs with a stairway leading to it from an inside hallway at the front door.

In 1944 petitioner's daughter became engaged to a returning soldier, and petitioner, desiring to complete the second floor of said building, so as to make it appropriate for a second family unit, and thereby accommodate her

daughter, who was soon to be married to a returned soldier, applied to the proper municipal authorities for leave to finish the upstairs portion of said building and filed the necessary sketches and architectural designs as provided by the building code of said Village.

The design as filed with the building commissioner of said Village provided for a kitchen, bedroom and bath with toilet facilities, in addition to the room already there, with the necessary plumbing, lighting, water, and usual accessories. It also provided for a dormer window to be cut and built into the roof in the southern exposure thereof, and an outside entrance, porch and stairway in the rear. Said design was prepared by an architect, and complied with all requirements of the building ordinances of said Village; and, as designed, there was no objection to the building, if so completed, except insofar as it might be said to be in violation of said zoning ordinance—in this—that the building when completed would be adapted to the use of a separate unit of the family.

Upon the sole ground that the building so arranged would violate said provision of the zoning ordinance, the building commissioner of the Village refused a permit to petitioner to so complete the building, and the Zoning Board and Village Board of Trustees upheld the building commissioner in his stand.

Petitioner's Complaint

Petitioner, believing that by such construction of the zoning ordinance by the Village officials, she was being deprived of her property rights without compensation and without due process of law, filed her said Complaint so alleging, and prayed for an injunction to restrain the said Village from interference with her rights to complete the upstairs of her building.

Petitioner in her complaint alleged that when said ordinance was passed said building existed in its then condition and was potentially adaptable for occupancy by more than one family; and that the additional rooms were necessary for use of her daughter who was about to marry an ex-serviceman; and that the restriction in the zoning ordinance, insofar as they prohibited petitioner's use of her building for the accommodation of another family unit were not essential to public health, or general welfare, or safety from fire, and other dangers (Tr. 8); that, insofar as said ordinance prohibits the use of petitioner's property for such purposes, it takes petitioner's property without compensation, deprives her of her property without due process of law, and equal protection of the laws, and is accordingly repugnant to the Federal Constitution and therefore void (Tr. 4, 9).

Petitioner charged that the restriction in the ordinance, as applied by the Village to petitioner's specific existing building, was arbitrary, capricious and unreasonable and bore no rational relation to the protection of public health, morals, safety and general welfare, and as applied to petitioner's property was void (Tr. 10); and petitioner prayed that the enforcement of said ordinance against petitioner's property insofar as it prohibited her from so using it, be enjoined.

Answer of Defendant Village

The answer of the Village of Oak Park was negative, denying the materiality and relevancy of the facts alleged in petitioner's complaint and claimed that

> "it is the duty of its officers to uphold the zoning laws of the Village of Oak Park and to enforce them to prevent encroachments which blight and destroy neighborhoods by permitting violations contrary to the intent of the zoning laws," (Tr. 14).

thereby inferentially claiming that the proposed completion and use of petitioner's building, with a second kitchen, would blight and injuriously affect the neighborhood and the territory as zoned.

The Controlling Facts

The controlling facts are not in dispute.

The zoning ordinance in question, enacted by the Village of Oak Park on September 21, 1921, placed petitioner's said property in a zone created as Zone "A" to be thereafter restricted, as to residence purposes, to the use of one-family residences only.

The dominant facts are of a physical nature, and are not controversial. The building involved is located near the Southeast corner of the Village, at 1811 South Lyman Avenue. The second block East of Lyman Avenue is Austin Boulevard, which is the East boundary of the Village of Oak Park, adjoining the City of Chicago. Austin Boulevard, including the Oak Park side of said street is zoned for apartment houses, hotels and multiple dwellings.

Plaintiff's house is located on a lot 42 feet wide. Immediately South of plaintiff's property is another building on a lot 33 feet wide, and adjoining this lot, a 16 foot alley running East and West separates the Zone "A" district from the commercial district, which is forty-nine feet South of plaintiff's property. At this point is located a gasoline filling station. Across the street from this gasoline filling station is a building 100x125 feet occupied by bowling alleys and lunchroom. This property, and the other commercial district zone properties, front Roosevelt Road, an East and West State Highway (Tr. of Record P. 51).

Roosevelt Road is a highly travelled thoroughfare, and is the boundary between the Village of Oak Park and the Town of Cicero, lying South of said Village of Oak Park.

Two and one-half blocks to the North of plaintiff's property, Lyman Avenue is intersected by Garfield Street, an East and West street, also zoned for apartments and other multiple dwellings. Along the North side of said Garfield Street and parallel thereto are located the railroad tracks and right of way of the B. & O. Railroad, and the Aurora & Elgin Railroad.

In the same street as plaintiff's property (and within the block) are four buildings occupied by more than one family; two of these on the same side of the street, 1163 and 1171 Lyman Avenue, and two on the other side of the street at 1152 and 1168 South Lyman Avenue. Three of these are occupied by two separate families each, and one is occupied by three separate families (Tr. P. 25).

The streets next East and West from Lyman Avenue, being Humphrey Avenue and Taylor Avenue respectively, and between Fillmore Street and the alley (being the rear of properties on Roosevelt Road), have respectively 7 and 5 buildings occupied by two families.

Lombard Avenue, the next street west of Taylor Avenue, contains a row of 7 regular brick two-flat buildings, containing separate apartments and occupied by separate families, namely, 1123 to 1136 Lombard Avenue (Tr. P. 32-33).

The residences on Lyman Avenue are largely of a two story, or story and half type, and some three story buildings. (See picture of building at 1185 Lyman Avenue, with dormer window, Tr. 51, and 53, 55, 57 and 59).

Thus it is seen that this one-family residence zone is spotted throughout with two and three family dwellings and bordered with apartments and business zones.

The Village of Oak Park is an adjoining suburb of Chicago, that has grown up with it and is and has been, for some thirty years, a closely built-up territory with well defined business districts and residential territories. It lies against the compactly built-up Western line of Chi-

cago and is served by two boulevards and three arterial highways with streetcar lines, all East and West bound leading into and out of Chicago. Oak Park, in dimensions, is three miles North and South and a mile and half East and West and has a population of 66,015, according to the 1940 census.

When the Village of Oak Park passed its zoning ordinance in 1921 it was and had been for many years, a developed community and the ordinance was adapted to sections of the municipality as they had naturally developed without planning.

The particular tract here involved covers a section of the Villlage containing about 39 blocks and lies in the Southeast corner of said Village.

At the time this district was zoned, it was practically fully built up, and no particular type of house existed in the zone, but residences equipped with facilities for one-family use were predominant in the Lyman Avenue Block in question. But many of the two story houses are equipped for two-family uses. The different types of houses on the street are shown by the pictures. (See Tr. 49, 53, 55, 57, 59.) But those houses had been fully completed, some of which were arranged for two and three family uses when the ordinance was passed, with no external indication of their actual use but with indications of their adaptability or potential use as two-family residences.

The Illinois Statute Authorizing Zoning of Municipalities

The Illinois statute under the authority of which the Oak Park ordinance was passed provides that its objective is adequate light, pure air, safety from fire and other dangers and to otherwise promote public health, safety, comfort, morals and welfare.

Provisions of the Ordinance

The ordinance in question provides as follows:

> "Sec. 35.930. Residence District "A": In Residence District 'A', the purposes permitted are for one or more of the following uses:
>
> "1. Dwellings, provided also that such dwellings shall be arranged and designed for the exclusive use of only one family."

In the Zone "A" district one or more of the following purposes are allowed: (1) one family dwellings; (2) churches; (3) educational institutions; (4) rights of way; (5) passenger stations; (6) parks, playgrounds, village community centers; (7) public libraries; (8) police and fire departments; (9) streets and alleys; (10) incidental accessory uses, including home occupations, etc.

Nonconforming Uses May Be Continued and Nonconforming Buildings May Be Completed

The ordinance further provides as follows:

> "Sec. 35.934; The lawful use existing at the time this ordinance takes effect of a building or premises may be continued, although such use does not conform with the provisions thereof."
>
> "Any building existing at the time that this ordinance takes effect, arranged or designed, or at that time devoted to a non-conforming use may be reconstructed or structurally altered, provided such structural alterations shall cost an amount not to exceed fifty (50) per cent of the value of the building, and provided also that the building shall not be enlarged unless the use thereof is changed to a conforming use."

Sec. 35.09 (26) of the Oak Park Ordinance defines a family as follows:

> "A family is any number of individuals living and cooking together on the premises as a single housekeeping unit."

It is pointed out that the "one-family" classsification under the Oak Park ordinance, places no limitation on the number of persons, nor that they actually need be members of the same family; while in addition thereto, the owner may legally lodge and board four persons for remuneration upon the premises located in the "A" one-family district, and specifically in plaintiff's property; for the Oak Park ordinance Sec. 35.09 (12) defines a boardinghouse placed in zone "B" to be as follows:

> "A building other than a hotel where lodging and meals for *five (5) or more* persons, but not exceeding twenty (20) persons are provided for compensation * * *."

Sec. 35.945 provides that:

> "After a public hearing before the Board of Appeals, the President and Board of Trustees may by ordinance determine and vary the application of any of the regulations of this Article in harmony with the general purpose and intent of such regulations relating to the use, construction or alteration of buildings or the use of land in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of such regulations."

It is pointed out that the design of petitioner's building, as is shown by the photographs (Tr. 49, 55), indicates an arrangement of the roof structure so that the second story could reasonably accommodate facilities for a second family unit, the same as on the first; and that the Village made no objection, when applied to for a permit, or at any time, to

the architect's design and arrangement of the rooms on the second floor, except as to the kitchen, the objection being to the proposed use; and it is tacitly conceded that the design of the house and its structure, tolerates the purpose for which petitioner proposes to arrange and complete it.

The Decree of the Trial Court

The trial court based its decree upon the general circumstances and consideration of the permissible uses and general scope of the ordinance, and held that the provisions of the ordinance restricting the property as to one-family use, as applied to petitioner's residence, had no rational relation to the public health, morals, safety or general welfare.

The trial court found that the first floor of the property of plaintiff consists of six rooms with a front hall stairway leading to the second floor, and that the second floor contains one finished room and the balance is unfinished, and available for additional rooms on said second floor.

The trial court further found that in the same block as the property of the plaintiff at 1163 and 1171 Lyman Avenue are 2 two-story buildings containing two flats, each flat occupied by separate families; and at 1152 Lyman Avenue is a large brick building containing three separate apartments; that the streets next East and West of said Lyman Avenue, being, respectively, Taylor Avenue and Humphrey Avenue, contain various two-flat, two apartment buildings; that on Lombard Avenue, being the next street West of Taylor Avenue, are located 7 regular, definite two-flat brick buildings and occupied by two separate families, the same being Nos. 1120-36 S. Lombard Avenue.

The trial court further found that there will be no material or substantial change in the plaintiff's property, its structure, or outward appearance, in allowing plaintiff

to complete the construction of an apartment on the second floor of her property, and while it will enhance the value of the property of plaintiff, and improve the same to its highest and best purpose and urgent need, it will not in any wise or manner affect the character of the neighborhood, or decrease the value of the premises near by or in the vicinity.

The decree found that the restrictions in the zoning ordinance, insofar as they prohibit the use of plaintiff's property for use as a two-family residence, are not necessary to the end that adequate light, pure air, safety from fire and other dangers may be preserved, or to the end that the taxable value of any land or building in said area may be conserved, or that congestion in the public streets of said Village may be lessened or avoided, or that the public health or general welfare may otherwise be promoted.

The decree enjoined the enforcement of the restriction in the ordinance as against petitioner's building.

Contentions of the Parties in the Supreme Court of Illinois

CONTENTIONS OF THE VILLAGE

The Village, on appeal, contended in the Supreme Court of Illinois that petitioner was making a general attack upon the zoning ordinance as a whole, and solely because apartment buildings were located in the same block and on other streets and the property was near the commercial district, and because the gasoline filling station and bowling alley were at the street intersection 49 feet South of the plaintiff's property.

Those were *feigned issues* and were not the contentions of petitioner.

CONTENTIONS OF PETITIONER

The ordinance as a whole was not questioned by petitioner. Neither the power of the Municipality to enact the

general zoning ordinance, nor the propriety of zoning Roosevelt Road 49 feet South of plaintiff's building, as a commercial district, were questioned.

The propositions advanced by petitioner in the Illinois Supreme Court by which to sustain the decree of the trial court were in substance that petitioner was entitled as of right to complete her building as designed and adapted and for any purpose within mental contemplation compatible with its design; that completion of said building was in harmony with the scope of the ordinance covering the district and permissible uses thereunder; and that the present housing shortage justified a liberal construction of the ordinance.

It was pointed out that it was not contended by the Village that the completion of the upstairs to accommodate another family unit would alter any existing status or burden existing facilities, or have any injurious effect on the zone or health, safety, morals or general welfare; that no objection was made by any property owner, and that the denial by the Village of leave to complete the building, as obviously designed and adapted, was arbitrary, unreasonable and the ordinance, so construed, void; and it was urged that the ordinance, as being enforced as to petitioner's building, bore no direct or substantial relation to the preservation of the public health, safety, morals, or general welfare; and that the Village made no showing by answer or evidence that the proposed completion of the upstairs would objectively or otherwise change or affect existing conditions.

Opinion of the Supreme Court of Illinois

The Supreme Court in its opinion disposes of the petitioner's contentions that her building could be regarded as potentially designed for completion as requested by stat-

ing that the evidence does not sustain her contention, and that:

> "to say that it was architecturally designed for an apartment on the second floor is not sustained by the record. It is simply an ordinary one-story residence with one room finished in the attic" (Tr. 66).

But, this Court will note the height and shape of the second floor of petitioner's building as compared to the ordinary one-story residence and attic on either side of it (Tr. 49-55). The answer is that the Village did not contend that the second floor was not suitable for the completion of the rooms as desired, including the dormer window; nor does the ordinance prohibit their construction thus for living quarters. The objection by the Village, and its restriction, is simply, that when completed as planned, one room may not be *used as a kitchen,* because they say, this will establish a separate housekeeping unit, and which, they say, is *now* prohibited, because the building is *now* in the Zone "A" one-family residence district.

The Supreme Court gave no consideration to, nor benefit of, the fundamental guarantees to the property owner under the Federal Constitution, and thus ignored the general scope of the ordinance as it operated on the fully developed area here involved. The Illinois Supreme Court failed to consider the permissible uses under the ordinance, and that the use proposed, but denied, was no more inimical to the public welfare than the uses *allowed.* The said Court further assumes, in its opinion, as alleged facts, but which nowhere appear in the record, that five lots in the block are vacant, and that 90% of the property in the block is devoted to one-family use.

But the question here is what is a one-family use, and, is that use restricted to *one kitchen.*

The Court based its opinion on general principles of law

relating to the power of a municipality to *zone an area,* whereas this case presents for determination the reasonableness of the restriction in the ordinance, Sec. 35.930, as applied to petitioner's specific existing building *in the area zoned;* and in particular, whether the restriction preventing petitioner from using her property for another housekeeping unit, as the Village interprets the ordinance, bears any substantial and rational relation to public morals, safety, comfort, or welfare (*Harmon* v. *Peoria,* 373 Ill. 599-600).

The other discussions in the Supreme Court opinion on the contentions raised by the arguments of counsel for the Village of Oak Park were not relevant to the issues as made in the case, and it was so pointed out to the Supreme Court of Illinois in the Petition for Rehearing (Tr. 72-88), but the Court adhered to its view *upon the general principles of law, applicable in cases where the construction of a new apartment building* or commercial building upon a vacant lot, in a residence zone, is in question.

Jurisdiction

Jurisdiction of the United States Supreme Court to Review the Judgment of the Supreme Court of Illinois

This Court has jurisdiction to review this cause because of the Federal Constitutional questions involved, and raised by plaintiff, and ruled upon by the highest Court of the State of Illinois, adversely to the contention of the petitioner, and in reversing the decree of the Superior Court of Cook County, which had held the ordinance unconstitutional as applied to plaintiff's property.

Plaintiff's rights under the 5th and 14th Amendments to the Federal Constitution are directly involved, and the Court has jurisdiction.

The Federal question is raised by the pleadings (Transcript of record pp. 4, 9, 12, 14) and by the trial court's decree (Tr. 20) and by the reversal of said decree by the Illinois Supreme Court.

Jurisdiction is invoked under Section 237 (b) of the Judicial Code; 43 Stat. 927; 28 U. S. C. A. Sec. 344(b).

Date of Final Order

The Supreme Court of Illinois denied a Petition for Rehearing on March 17, 1947 (Tr. 89).

On June 9, 1947, Mr. Justice Murphy entered an order extending time to file this petition for certiorari to July 7, 1947.

Questions Presented

Where, at the time a one-family zone is created by ordinance, there exists in the zone a two-story building, the first floor of which is completed as a unit for one family and one room, with stairway thereto, has been built on the second floor; and where such building is so architecturally designed in its roof construction that its upstairs could reasonably be arranged into a three room apartment with living room, bedroom, kitchen, and bathroom, with necessary stairways, air and light, so as to be used for the accommodation of an additional family unit; does the owner have the right, after the passage of the zoning ordinance, to complete the building so as to accommodate it to the use of two family units, where nothing appears in the record to indicate that the public safety, health, morals or general welfare will be thereby in anywise injuriously affected?

Where a building which might of right have been completed as a two-family residence, has been commenced and sufficiently finished to accommodate a one-family unit, and construction thereof has been suspended for convenience of the owner, and occupied and used in the meantime as so

partially completed; and, while so occupied and used, the municipality has passed a zoning ordinance and placed the property on which the building stands in a one-family zone —may the owner, as of right, thereafter complete such building at his convenience so as to accommodate two families, notwithstanding such ordinance; provided public safety, health, morals and public welfare are not injuriously affected thereby?

Where construction of a two-family building has been commenced and partly constructed prior to the passage of a zoning ordinance, placing such property in a one-family residence zone, is the owner's right to complete and use such building as a two-family residence, as such right existed when the ordinance was passed, such a right as is constitutionally protected?

Where no injury is shown coming to anyone, nor any relation to the public welfare, is there still such a condition attached to the constitutionally protected right to the desired use by a family of an existing building, that it must be shown that the property is, by the restriction, diminished in value; and further that the showing must be made by any greater, or by more direct proof, than the common knowledge that the building with one completed apartment is of less value than with the added apartment and added rental income therefrom, as is held by the Supreme Court of Illinois?

Wherein can a restriction, as applied to a building, existing before the enactment of the ordinance, against the use of a room as an additional kitchen, have any relation to public morals and general welfare, where the building is in harmony with the general scope of the ordinance in the area, and the ordinance contains no limitations on the number or relationship of persons occupying said building?

Is an owner of a one-family building in a developed and

built-up district, which is not strictly devoted to one-family residences, protected by the 5th Amendment and 14th Amendment from the impact of a zoning ordinance, which would take away the right of said owner to have within said building an additional kitchen?

Where a zoning ordinance restricts an area to one-family residences, does the municipality have power to restrict such one-family residences to one kitchen in the house?

Where a "family" as defined in a zoning ordinance as

> "any number of individuals living and cooking together on the premises as a single housekeeping unit"

is the municipality justified in arbitrarily denying the head of the family owning the property from arranging his dwelling with an additional kitchen where it does not appear that public health, morals, safety or general welfare will be injuriously affected thereby?

Is the arrangement of a one-family dwelling with two kitchens in anywise injurious to public health, safety, morals or general welfare?

Is the provision of a zoning ordinance void which restricts the right of a family to have only one kitchen in a one-family residence?

Does the police power of a municipality give it jurisdiction to compel a family unit to "cook together as one family unit" when residing in a one-family residence zone?

Reasons for the Allowance of the Writ

I

The restrictions placed by the officials of the Village upon the interior arrangement of petitioner's building, and such use thereof as may be suggested by family convenience, is plainly an unwarranted direction as to where a family, occupying the house, may cook and have their meals; and,

ipso facto, such a regulation of their personal life within the home, is a denial of personal freedom, and in violation of constitutional guarantees.

And the Village of Oak Park in the exercise of its police powers has obviously and plainly and arbitrarily gone far beyond the necessities of the situation, and has placed restraints upon human conduct, under the guise of police powers, when there is no threat to public safety, morals, health, or welfare, to be found in the proposed construction of an additional kitchen, and its use as such.

II

The decision of the trial court and its reversal by the Supreme Court of Illinois raises an important question of Federal law which does not appear to have been heretofore passed upon by this Court.

Zoning cases which have been considered by this Court have involved the determination of the legality of zoning ordinances generally and the power of the municipality to enact them.

This case involves the right of an owner to complete his building within the scheme, plan, or purpose of its architecture and within the scope of the ordinance affecting this built-up district, notwithstanding limitations of a zoning ordinance which was enacted after the building was partly constructed; and where the owner has been denied the right to complete the building, notwithstanding that the public safety, health, morals and public welfare will not be injuriously affected by the completion of said building. That right will be lost unless this Court takes this case for decision.

III

Aside from the right of the owner as protected by the Constitution, a question of immediate public concern is pre-

sented as to the relief of the acute housing shortage now existing.

Aesthetic and Idealistic Zoning Is One of the Causes of the Housing Shortage

While this suit involves only one piece of property, the principle to be decided has wide application for the question to be answered is of immediate concern to thousands of persons seeking housing facilities. If the zoning of whole subdivisions and municipalities is idealistic and aesthetic, having no substantial relationship to public health, safety, morals, or welfare, then a decision of this Court will go a long way toward relief of the present housing shortage by furnishing a welcome basis for urging a constitutional right to arrange additional facilities for other family units in a building adaptable to such change. The cases in the Illinois reports mentioned herein show that many populous centers have districts zoned for one-family dwellings with the same restriction as to one kitchen imposed upon the use of the interior of the building by the whole family unit; although the "family" is unrestricted in number and requires no relationships.

The question is one of great public concern and for such reason this case should be taken for decision.

The Opinion Below

The opinion of the Supreme Court of Illinois is reported as *Angeline DeBartolo* v. *Village of Oak Park*, 396 Ill. 404.

Error Relied Upon

The Supreme Court of Illinois erred in reversing the decree of the Superior Court of Cook County, Illinois.

Prayer

WHEREFORE, petitioner prays that the Court allow this petition and grant its Writ of Certiorari directed to the Supreme Court of the State of Illinois to the end that its said judgment may here be reviewed.

Respectfully submitted,

ODE L. RANKIN,
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BRIEF

I

Statement

Argument, *post.*

II

THE RIGHT TO DEVOTE PROPERTY TO ANY LEGITIMATE USE IS WITHIN THE CONSTITUTIONAL PROTECTION.

Seattle Trust Co. v. *Roberge,* 278 U. S. 116;

Merrill v. *City of Wheaton,* 356 Ill. 457.

III

A MUNICIPALITY HAS NO POWER TO REGULATE FAMILY LIFE BY PROVISIONS OF A ZONING ORDINANCE.

Harmon v. *City of Peoria,* 373 Ill. 594, 602.

IV

WHEN THE VALIDITY OF A ZONING ORDINANCE IS NOT QUESTIONED GENERALLY, BUT ONLY SPECIFICALLY AS TO THE PLAINTIFF'S USE OF THE PROPERTY, BURDEN IS ON THE MUNICIPALITY TO JUSTIFY THE APPLICATION OF ITS ZONING LAW TO THE INDIVIDUAL PIECE OF PROPERTY.

Argument, *post.*

V

WHERE THE APPLICATION OF THE DETAIL OF A ZONING ORDINANCE SHOWS AN INJURIOUS EFFECT UPON PRIVATE PROPERTY THE BURDEN IS UPON THE MUNICIPALITY TO JUSTIFY ITS ACTION BY SHOWING THAT THE BENEFIT TO THE PUBLIC OUTWEIGHS THE DETRIMENT TO THE PROPERTY OWNER.

Argument, *post.*

VI

RESTRICTIONS UPON FAMILY LIFE FURNISH NO LEGITIMATE BASIS FOR ZONING A MUNICIPALITY.

Merrill v. *City of Wheaton*, 356 Ill. 457;
Harmon v. *City of Peoria*, 373 Ill. 594;
Anderman v. *City of Chicago*, 379 Ill. 236.

VII

THE SUPREME COURT OF ILLINOIS DID NOT CONSIDER THE QUESTIONS HERE INVOLVED.

The following cases, decisive of the questions here involved, were ignored by the Supreme Court:

Merrill v. *City of Wheaton*, 356 Ill. 457;
Harmon v. *City of Peoria*, 373 Ill. 594;
Anderman v. *City of Chicago*, 379 Ill. 236.

The following cases, relied upon by the Supreme Court, have no relevancy to the case at bar:

Evanston Best & Co. v. *Goodman*, 369 Ill. 207;
Minkus v. *Pond*, 326 Ill. 467;

VIII

THE RIGHT TO USE ONE'S PROPERTY AT DISCRETION CANNOT BE DENIED IN THE ABSENCE OF INJURY TO HEALTH, SAFETY, COMFORT, AND GENERAL WELFARE.

Seattle Trust Co. v. *Roberge*, 278 U. S. 116;
Womans Kansas City St. Andrews Society v. *Kansas*, 58 F. 2nd 593.

ARGUMENT

I

Statement

The ultimate question here presented is whether the Village of Oak Park may deny to petitioner the right to have a second kitchen in the building on her property which is zoned as a one-family residence district, where a "family" as defined in the zoning ordinance, may consist of "any number of individuals living and cooking together as a single housekeeping unit"; that is—does the restriction to one kitchen to a family, as imposed by the enforcing officials, bear any reasonable relation to the police power; and does such a second kitchen tend to injuriously affect public health, morals, safety or welfare?

The validity of the zoning ordinance of the Village of Oak Park is not questioned so far as it creates a one-family residence zone. This Court and the Illinois Supreme Court are in harmony on the general theory that a zoning ordinance may be valid in its general provisions, but, may violate constitutional rights in its local applications to individual properties, which violations may be remedied as they arise (*Euclid* v. *Ambler Co.*, 272 U. S. 365, 395; *Harmon* v. *City of Peoria*, 373 Ill. 594, 600-601).

The zoning district here in question is a "one-family" district, wherein the dwellings "shall be arranged and designed for the exclusive use of only one family"—a family being defined to be "any number of individuals living and cooking together on the premises as a single housekeeping unit" (Tr. 6).

The definition of a "family," it is seen, is arbitrary and artificial, and is not restricted as to numbers, units, or relationships. It is merely a housekeeping group.

It is contended that the ordinance, as construed by the officials, is arbitrary and unreasonable, in that it restrains and confines the family, as defined, to the use of one kitchen; thus, *compelling such a combination of persons* to cook in one kitchen in order that the building may be considered as being used as a one-family residence.

That question of invalidity of the ordinance is raised by the refusal of the Village Authorities to allow petitioner to complete the upstairs of her building because her plan and specifications show a kitchen that indicates that when completed it would permit the use of the upstairs by a separate family unit.

It is contended by petitioner that the right to so finish the building was an existing right when the zoning ordinance was passed and that the use of the premises by a second family unit, so far as cooking and the use of a kitchen is concerned, does not tend in any substantial or material way to injure public health, safety, comfort, morals or welfare; but on the contrary would be beneficial and tend to promote it, and accordingly, the ordinance as applied to petitioner's residence is void.

The narrow question here is whether petitioner may have a second kitchen in her residence. No objection was made to the plan of the completion, otherwise.

II

The Right to Devote Property to Any Legitimate Use Is Within the Constitutional Protection

It is conceded that the creation of the one-family residence zone here in question is a valid exercise of the police power of the State delegated to the Village.

We dispute, however, that the Village has power to say that a family may not have for its convenience two kitchens

in the one-family home; because there is no reasonable, practical, or substantial relation between that restriction and the basis of police power, public health, morals, comfort, safety, or general welfare.

The artificial family as created by the ordinance has no limitation as to relationship, or numbers, and may consist of more than one family unit; and of wholly unrelated persons; it is just a group of persons required to have *one common kitchen.* It has no other test, no attributes of family life.

As we live in America, and as commonly understood, a family is a household group with a common ancestry, and may include daughters-in-law and sons-in-law and grandchildren, the number varying with circumstances.

How a family may live inside its dwelling, or what facilities it may use in its home life is of no concern to municipal authorities so long as it lives within the law and its mode of life does not conflict with the police power.

Such a requirement *is not a classification but is an unwarranted restraint,* a restriction upon normal family life. It is an attempt to classify by placing a restriction on family life.

Cooking stoves, refrigeration, kitchens, bathroom facilities, bedrooms, are all part of a family home. There is no basis for saying that a one-family dwelling may not have two kitchens, two bathrooms, two bedrooms, or two anything, as may be convenient for the family.

More than one bathroom in a one-family dwelling is now frequently met with; and two kitchens are not uncommon.

Here the sole objection made by the municipality to the proposed completion of petitioner's building is its kitchen arrangement, or the use to which it is proposed to put one room.

But for the use of one room as a kitchen, the Village made

no objection to the proposed completion of the upstairs portion of the building. To put it plainly, the zoning ordinance requires that the common type of family must live inside the dwelling in the manner the *ordinance dictates,* and not as *family convenience may suggest.*

Unreasonable Restrictions Cannot Be Made under the Guise of Police Power

This Court considered the case of *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116 which involved the right of the owner of property, zoned in a residence district, on which stood an Old People's Home building accommodating 14 persons, to construct in its place, a new structure to accommodate 30 persons. The city refused permit solely on the ground that the zoning ordinance required frontage consents of two-thirds of the property owners living within 400 feet of the home.

This Court there held that the municipality could not, under guise of police power, impose unnecessary and unreasonable restrictions upon the use of private property nor prevent useful activities (P. 121), and said that there was nothing in the record to show that the new building would be likely to work "injury, inconvenience, or annoyance, to the community, district or other persons" (P. 122). That holding was followed in *Merrill* v. *City of Wheaton,* 356 Ill. 457.

That rule is here applicable, for the objection to the completion of the building is to the use of a room *as a kitchen* so that it may be used by a second family unit, when the record discloses nothing injurious will result from the proposed change.

The Right to Complete the Building Existed When the Ordinance Was Enacted

The building here was originally designed for extra rooms in the second story as shown by the roof construction (Tr. 49, 55). It could then have had a kitchen upstairs as of right. The right to complete the second story existed when the ordinance was enacted, and the denial of the right to complete it, as requested, was the destruction of that right, and, to that extent, was the taking of petitioner's property without compensation and due process.

The zoning ordinance itself provides for completion of nonconforming buildings.

And in any event, the municipality had no power to restrict the use of petitioner's dwelling unless the proposed use offended against the police power and was in fact injurious to health, comfort, safety, or public welfare.

An additional kitchen, for use of persons admittedly privileged to live as members of the family, is not an offense against the police power.

III

A Municipality Has No Power to Regulate Family Life by Provisions of a Zoning Ordinance

Under the ordinance definition of a family, it is to be noted that there is no limit in numbers, nor is there any relationship of parties required. Any group of persons may constitute such a "family." Within that definition, two or three families, as defined by relationship, could be embraced.

The question is presented whether under such a definition it is reasonable to restrict an ordinary American family group to one kitchen and require them all to cook together in order to use the residence and live in the district. In

other words, is it reasonable to ban the use of two kitchens in the district? We think the definition itself contains a thought repugnant to our way of family life.

We can all agree that if the ban was as to bathrooms, and attendant facilities, that the restriction would be deemed clearly unreasonable; especially where as here the number of persons composing the family is unlimited.

To say that an ordinary American family may not have a second kitchen for the convenience of a second family element, such as a son-in-law and his family group, or daughter-in-law and her group, where the design of the existing house makes it convenient, is to make the *ordinary conveniences of family life* the basis upon which a district may be zoned; or, is to use a zoning ordinance as a guise for the regulation of family life.

That such regulation is arbitrary and unreasonable is shown by the obvious fact that imagination, not to say reason, cannot supply, nor suggest, any relation between such a regulation and public health, morals, safety or welfare.

A family might increase until it overflowed into the street and it would not violate this ordinance; and yet, it could not convenience itself with the ordinary housekeeping facilities.

A Zoning Ordinance Does Not Operate Retrospectively

The restriction of buildings in a "one-family" district to dwellings "arranged and designed for the exclusive use of only one family," pertains, of course, to the *erection of dwellings* in the district *after* the passage of the ordinance, and to maintenance of the existing status.

The zoning law allows the creation by a municipality of a residence district but it never was intended to grant power to a municipality, in zoning a city or village, *to enter*

into family life and regulate the facilities a family may enjoy inside the home, or turn back the clock upon the permissible use and existing design of standing buildings.

A family may consist of many members, and there are some large ones, as all of us know. Obviously, the number of household facilities and conveniences should not be made to depend upon the zone, but should rest in the discretion of the homeowner. Here it was intended by petitioner to receive the new son-in-law into the family as one of its members; and convenience, if not absolute necessity, here justifies the additional housekeeping facilities, as planned in the completion of said building.

Zoning Is Not an Aesthetic Process

Zoning a district for one-family residences is legal; but, legislating how the family may live inside such a dwelling is no part of the police power. Indeed, such interference in family life is not zoning nor the exercise of police power; it is just the injection of the aesthetic ideas of the Village fathers into the home life of the Villagers. Culture is not the objective of the zoning law, but health, comfort, safety and welfare are the grounds of the exercise of the police powers of the State.

It Is the District That Is Zoned, Not Family Life

The "kitchen facilities" classification, injected into the ordinance by the construction given to it by Village officials, is not a *classification* at all. *The classification is one-family dwellings.* It is the restriction upon use of the dwelling for family life under the arbitrary definition of a "family" that is unreasonable and arbitrary, and that *restriction* cannot be made the basis nor test of a one-family *residence zone.*

The Village officials make no objection to granting a permit to complete the upstairs as requested, except only as to the room specified to be for additional kitchen facilities.

The Definition of "Family" Has No Relation to Police Power

The Supreme Court of Illinois itself recognizes that a "one-family dwelling," as here defined, bears no relationship in fact to the number of persons, nor the number of families, living as a "family" in a one-family dwelling. In *Harmon* v. *City of Peoria,* 373 Ill. 594, 602, the Illinois Supreme Court was passing upon a zoning ordinance with the same definition of "family" as is found in the Oak Park ordinance here in question, and said:

> "Indeed any number of persons may occupy a house as a 'family' within the contemplation of the ordinance, and divide the housekeeping expenses, provided only they live as a solitary housekeeping unit, using a single kitchen. Manifestly, the term 'one-family dwelling' bears no relation in fact to the number of persons or families living in a building."

In that case the Supreme Court *approved three kitchens* where the design of the building would accommodate that number, although it was in a one-family residence zone.

And that is necessarily true here for the ordinance says, in so many words, that a family is "any number of individuals" living together as one unit. There may be the parent family, sons, daughters, the sons-in-law, the daughters-in-law, and the grandchildren; but numbers, and the number of family units, receive no consideration under the Oak Park Ordinance as the Village says there must be but *one kitchen,* and that, without reference to the number of family units, or persons in the family.

Palpably that provision is unreasonable; for all reason and logic says that public health, morals, safety, and general welfare would be promoted, rather than injured, by allowing a second kitchen for a new family unit; and that is our American way of life.

Certainly, it cannot be said that allowing any number of persons who may consist of several family units to live together as a "family" and yet restricting them to cooking in one kitchen promotes health, morals and general welfare.

The arbitrary definition of a "family," as used here, as a basis of zoning, leads naturally to restrictions upon normal family life, and here the municipality is enforcing that restriction—not to the letter—but beyond both spirit and letter.

The basic idea of zoning does not contemplate placing *restrictions* upon the use of ordinary family conveniences, nor to descend to regulation of family life. The home is the castle so far as municipal authorities are concerned. They may zone the territory, or district, but may not restrict normal family life inside the home while so doing.

IV

When the Validity of a Zoning Ordinance Is Not Questioned Generally, But Only Specifically as to the Plaintiff's Use of the Property, Burden Is on the Municipality to Justify the Application of Its Zoning Law to the Individual Piece of Property.

As to the fundamental question here to be answered it may be confidently stated that the proposed completion of the upstairs of petitioner's house will not operate in any perceptible degree to injuriously affect the immediate neighborhood in question, or its zone. The fact is patent,

obvious. The physical facts demonstrate it. The only visible exterior change will be the building of a dormer window in the South exposure of the roof. But a glance at the architecture of the period as shown by the other houses on the street, each an individualistic example, shows that such a window is more in conformity with the prevailing architecture than against it. (See pictures Tr. 51, 53, 55, 57, 59.) Who, here, is in a position to complain about the architectural appearance of his neighbor's house?

The Village by defending on the one point that it will not permit additional kitchen facilities in the construction of petitioner's building necessarily concedes that a second family use of said building will not burden the public facilities of water and sewer, or electricity, light or air. There is no overcrowding, no objective change, no improper use, upon which it may be said that the proposed use would injuriously affect the public health, safety, comfort, morals or welfare. The Village presented no evidence, and did not attempt to justify its position except to point to its zoning ordinance.

On the contrary, it may be reasonably said that to allow the premises to be adapted to the use of two families will be conducive to public convenience, comfort, health, and welfare. Obviously, the zoning laws cannot be administered from a purely aesthetic viewpoint. They must be practically dealt with. So where the proposed use is not out of harmony with the type of life in the zone, will offend no one, will be no appreciable burden on public facilities, and where the completion of the building will contribute to the convenience of family life, and relieve to that extent, the great housing shortage, reason and logic say the change should be allowed, and, welcomed.

V

Where the Application of the Detail of a Zoning Ordinance Shows an Injurious Effect upon Private Property the Burden Is upon the Municipality to Justify Its Action by Showing that the Benefit to the Public Outweighs the Detriment to the Property Owner.

Here the only justification shown by the Village was that it was the duty of the authorities, as it pleaded, "to uphold the zoning laws of the Village of Oak Park and to enforce them in order to prevent encroachments which blight and destroy neighborhoods by permitting violations contrary to the intent of the zoning laws" (Tr. 14). But the Village makes no effort to show that the allowance of kitchen facilities on the second floor would, in anywise, injuriously affect public health, comfort, safety, morals, or welfare. Obviously a multiplicity of kitchens would injure no one.

Certainly the burden was on the Village to show that the denial of ordinary family facilities had some basis in the police power. There can be no presumption that a municipality has power to restrain the owners of an existing building from making ordinary use of it, like having an extra kitchen; and, there being no such presumption, the Village necessarily had, in some way, to justify its restriction upon the use of the property for ordinary household purposes.

The Village made no such showing, and offers no justification beyond the fact that it has so ordained. But a zoning ordinance *does not justify itself* as to its application to individual pieces of property when it is challenged as being arbitrary and unreasonable, and the physical facts are shown.

Here the interference with the ordinary use of the building was shown, but the Village offered no justification. It

merely confessed that it had so ordered and demurred, raising a question of law only.

As the Village showed no facts to justify the exercise of the police power, in forbidding an extra kitchen in a one-family dwelling, the trial court correctly ruled that the ordinance was void in that respect as applied to petitioner's property. For if there was no police power, there was no authority.

VI

Restrictions upon Family Life Furnish No Legitimate Basis for Zoning a Municipality

The particular blocks here involved are only a fraction of the one-family districts of the Village of Oak Park; and the reports show that other municipalities use the same definition of "family" for the group of persons who may occupy a "one-family dwelling," from which, it is seen, that the question here presented applies broadly, if not generally; and petitioner's property is not an isolated case of family restriction.

In the case of *Harmon* v. *City of Peoria*, 373 Ill. 594, the same definition of "family" and "boardinghouse" is there used as here and, as applied to the house there in question, it was held that three separate housekeeping units, *three kitchens*, for three family units, in a one-family residence zone, was no more inimical to public welfare than the accommodation of one family with the permissible four roomers and boarders there allowed; and such *restriction*, it was held, bore no relationship "in fact to the number of persons or families living in a building" (p. 602).

In *Merrill* v. *City of Wheaton*, 356 Ill. 457, where the same definition of "family" was used, it was held discriminatory and unreasonable, where the owner was changing her one-family house to accommodate two families, and

where, next door, a building could be used for twenty-eight persons; and yet she could not, under that ordinance, have two families, of two persons each, in her building. There, the Illinois Supreme Court cited *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, as authority for the statement that unnecessary and unreasonable restrictions upon the use of private property, or pursuit of useful activities, could not be imposed by the lawmaking authorities under the guise of the police power, and the classification there based upon family life, was there held void (356 Ill. 457, 458, 460).

In *Anderman* v. *City of Chicago,* 379 Ill. 236 it appears that the Chicago zoning ordinance defines a "family" as "one or more individuals living, sleeping, cooking and eating on the premises as a single housekeeping unit" (p. 238). It was there held that such a classification was unreasonable in view of the unlimited number of persons that could compose a family and reside in a residence, and, in view of the collateral, or auxiliary, or permissible uses, "the restriction against the use by two separate families, with separate kitchens and bathroom facilities is arbitrary and unreasonable" (p. 243).

In each of those three cases other circumstances were present to *accentuate the rule,* but, the classification of a residence zone by the arbitrary definition of a "family" was held void. Of course the court would not go beyond the case before it, as to constitutional questions, but its holding is clear and unmistakable that a one-family residence zone cannot be based upon restrictions against the use of separate kitchen facilities. Restrictions when thus applied, *are not classifications* and all such *restrictions* are unreasonable and void.

The Question Is Not Local, But General

The question raised here is not local, nor restricted to the specific piece of property here in question. It involves all the residential districts of the Village of Oak Park; and not only Oak Park, but the City of Chicago, the City of Peoria and the City of Wheaton as shown by cases in the Supreme Court of Illinois, herein cited.

The Supreme Court of Illinois has three times held such a classification, when used as a basis for zoning one family residence districts, to be void (*Merrill* v. *City of Wheaton*, 356 Ill. 457; *Harmon* v. *City of Peoria*, 373 Ill. 594; *Anderman* v. *City of Chicago*, 379 Ill. 236). Of course, the court went no further than the property before it, but definitely it has held as a controlling consideration that such a classification was void. In those cases the other conditions, all arising from the fact that the character of the zone was formed, as here, before the zoning ordinance was enacted, were considered, but those conditions only *accentuated* the necessity of the ruling. For no matter what the type of the building, an additional bathroom, an additional kitchen, or sleeping room, *were matters of right*, if the architectural design would permit, and the structural design would tolerate; and especially here where no injurious effect is shown coming to anyone.

Here for a good reason, an urgent reason, petitioner desired to finish out the skeleton of the inside of the second story for her daughter and her fiance, the returned veteran, to reside in when married.

Public Convenience and Necessity Require That This Court Decide the Question Here Presented

It might be suggested that but for the unreasonable restrictions imposed by the type of zoning ordinance here involved, where the only real question is the right to use, in

the home, an additional kitchen, the current housing shortage could be materially relieved. Of course, people are normally obedient to ordinances, and assume their validity, and municipal officials assume that they have an overwhelming duty to enforce their ordinances to the letter, and without due consideration to the owner's rights protected and guaranteed by the Federal Constitution. Thus, little is done about it; but we suggest that public convenience and necessity require that this Court take this case for decision. It will break the jam and point a way for additional housekeeping facilities. Municipal officials will follow the suggestion in such a decision, and re-zone, or allow modifications as applied for, in conformity with the constitutional rights of the owner.

VII

The Supreme Court of Illinois Did Not Consider the Questions Here Involved

The Supreme Court of Illinois ignored its prior decisions, made at least in three cases (*Merrill* v. *City of Wheaton,* 356 Ill. 457; *Harmon* v. *City of Peoria,* 373 Ill. 594; *Anderman* v. *City of Chicago,* 379 Ill. 236), that a house located in a district zoned for one-family residences could not be restricted to a single kitchen, for the reason that such prohibition

> "bears no rational relation to the protection of the public health, morals, safety and general welfare. As applied to plaintiff's property the ordinance is void" (*Harmon* v. *City of Peoria,* 373 Ill. 594, 602).

The Supreme Court of Illinois explained those three cases by stating simply that these cases

> "involved small tracts zoned for residential use, which were surrounded by property zoned for commercial use" (Tr. 68).

That is true of the *Anderman* case only; but that does not negative the holding made in that case, based on the *Harmon* case, that the restriction of a family to one kitchen in a one-family residence zone was an arbitrary and unreasonable restriction, and therefore unconstitutional.

Obviously, the size of the zoned tract has no reasonable relation to the arrangement of the interior of the building for housekeeping purposes. The protection to the property owner, guaranteed by the Constitution does not depend on whether or not the building is located in a small tract; nor on how much "surrounded" the tract need be, by commercial zones. No such rule of law is to be found in any of the prior decisions of the Illinois Supreme Court; nor in any decisions of other jurisdictions, nor of this Court.

The Supreme Court of Illinois for some reason, not at all obvious, stated that:

> "The situation as to the property of plaintiff in this case is quite similar to the situations prevailing in Evanston Best & Co. *v.* Goodman, 369 Ill. 207, and Minkus *v.* Pond, 326 Ill. 467. These cases seem to dispose of plaintiff's contentions on every question raised in this case" (Opinion Tr. 67).

But these cases are wholly different from the case at bar. In *Minkus* v. *Pond,* 326 Ill. 467, there was involved the erection of a new three-story, thirty-three apartment building on vacant lots, in an area zoned for one-family residences. And *Evanston Best & Co.* v. *Goodman,* 369 Ill. 207 involved the right to erect a commercial building on vacant lots in a "B" residential zone. Palpably, those cases bear no similarity in neither principle nor fact, with the case at bar and reliance upon them indicates that the Supreme Court of Illinois must have entertained an erroneous conception of this case, where there is involved only the right

of an owner and head of the family to have two kitchens in a house, in existence before the enactment of the ordinance; and where the definition of a "family" has no limits as to numbers or relationships.

Apparently, the Illinois Supreme Court decided the case at bar from the viewpoint that petitioner was challenging the right of the municipality to zone, as a one-family residence district, the area in which petitioner's property is located—and thus the said court fell into error, in the determination of the constitutional question here involved. For nowhere has petitioner contended that the ordinance is unreasonable because Roosevelt Road—50 feet to the South—is zoned for commercial purposes, and because of the proximity of the apartment zones and apartment buildings. Petitioner has not maintained that her property should have been included in the apartment zone; nor that it was unreasonable to have zoned Roosevelt Road as commercial and then stop at the alley. Such are the propositions involved in the cases relied on by the Illinois Supreme Court; and not the right of an owner to use one of the permissible rooms in an existing building for an extra kitchen.

Those cases have therefore no relevancy to the case at bar, where the issue is not the proximity of the neighboring zones, not the erection of a new building out of harmony with the general scope of the zoned area, and not even the addition of a second story, over a one-story building; but plainly and only the right of petitioner to have in her *existing building in the area zoned,* the use of another kitchen. It is the denial of this right by the Village that goes too far, and which is within the ban of the constitutional guarantees. The apartment buildings in the same block and other blocks in the area, the close-by apartment zones, gasoline filling station and other commercial buildings and commercial

zone, only accentuate the answer to the statement by the Village that the use of the additional kitchen facilities in this residence will, as they say, "blight the neighborhood."

In the case at bar, the trial court found that the restriction in the ordinance, as thus imposed on petitioner and her property, is not necessary for the promotion of public health, morals, safety or general welfare. The necessary basis for the support of the invasion of the property of plaintiff is wanting, and the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained (*Nectow* v. *City of Cambridge,* 277 U. S. 183).

The trial court, following prior decisions of the Supreme Court of Illinois, gave plaintiff relief from such unjust, arbitrary, and unreasonable provision of the zoning ordinance on the facts as they exist; but, unfortunately for petitioner, the Supreme Court of Illinois has now placed its decision upon a wholly different theory; and in direct opposition to other of its well considered and sound decisions.

This Court should therefore take this case to correct the error of the Supreme Court of Illinois which, if allowed to stand, will take petitioner's rights and property without due process or compensation; and many others in Illinois, who are similarly situated, will likewise have their property rights similarly destroyed.

VIII

The Right to Use One's Property at Discretion Cannot Be Denied in the Absence of Injury to Health, Safety, Comfort and Welfare.

It is suggested that the case of *Washington ex Rel. Seattle Title Trust Co., Trustee,* v. *Roberge, Superintendent of Buildings, etc.,* 278 N. S. 116, has substantially decided the

point here raised. There, an Old People's Home building was located in a district zoned for single families and there was a provision in the ordinance permitting the construction of such a home if the consent of two-thirds of the property owners within 400 feet should consent to such structure. The Trustee proposed to construct a new building to house 30 persons to take the place of the old structure which was for 14 persons. Without the consents required by the ordinance, the permit was refused, and suit followed.

The only defense interposed was that no consents were given by the property owners as required by the ordinance. This Court held that the requirement of the ordinance as to frontage consents was void when it did not appear that the proposed building and its use would be inconsistent with the public health and welfare, and the restriction as to consents was therefore beyond the police power of the municipality to exact. And here, where the only defense is that the completion of the building with a second kitchen would allow the building to house two families, the answer is that the definition of a "family" in the ordinance may include several family units, and the municipality has no police power to forbid the owner of a property from having more than one kitchen inside his house, and that such a restriction has no rational relationship to the police power.

IX

It Is Not Necessary to Prove the Obvious

The question of increase or diminution in value of the premises in question as commented on by the Supreme Court of Illinois has no place in this case. The question here is one of *right* of a person to use the interior of a house as *desired* and within the general scope of the ordinance, in the zoned area, without injury to anyone. If the question

of value were at all relevant, the fact that a second story was to be finished supplies the answer. It is not necessary to prove, what we all know without proof, and that which is common knowledge.

Conclusion

It is respectfully suggested that the questions raised here are substantial, and petitioner has been deprived of a right guaranteed by the Federal Constitution which will be surely lost to her if this Court does not take the case for decision.

WHEREFORE, it is suggested that the record is such that in the exercise of the discretion reposed in this Court the writ of certiorari be granted and the cause reviewed.

All of which is respectfully submitted.

ODE L. RANKIN,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 194

ANGELINE DEBARTOLO,

Petitioner,

vs.

VILLAGE OF OAK PARK, A MUNICIPAL CORPORATION,

Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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STATEMENT OF THE CASE.

The issues are incorrectly set forth in the petition and brief of the Petitioner. The facts have been given in a disconnected manner, with many of the leading facts either omitted or erroneously given. Accordingly, it is necessary for the Respondent to state the issues and to give a statement of the facts as borne out by the record.

The Issues.

The complaint filed by the Respondent in the trial court (R. 1-10) gave the legal description of her property and its physical appearance. (R. 2.) It alleged that applica-

tion had been made to the Building Commissioner of Oak Park to re-model the second floor of her property so that the second floor might be used as a separate apartment (R. 3); that the application was refused (R. 3); and that the action of the Building Commissioner is illegal and in total disregard of the plaintiff's rights "in her property, and in contravention and in violation of both the State and Federal Constitution." (R. 4.) Following that it describes the boundaries of Oak Park and the streets in the neighborhood of the plaintiff's property. (R. 5.) It then alleges that there is a zoning ordinance in Oak Park defining, among other things, a "Residence District A"; and that the plaintiff's property had been placed in a Residence "A" district although it was "potentially" for occupancy by more than one family and although other multiple dwellings "are located in the same block and other blocks adjoining property of plaintiff." It describes with more detail the multiple dwellings in the same block and along nearby streets (R. 7) and gives the details of a commercial zone immediately to the south of the property. (R. 8.) These factual allegations are followed by the allegation that the action of the Village Board "in its determination to enforce said ordinance against the plaintiff and her property, under the facts herein stated, is discriminatory and unreasonable in the extreme" (R. 8); and that the ordinance in prohibiting the use of the property as a two family residence "takes and damages the property of the plaintiff without compensation, and deprives the plaintiff of her liberty and property without due process of law, and denies to the plaintiff equal protection of the laws and is therefore unconstitutional and void so far as it operates."

The sole witness offered by the plaintiff to establish the allegations in the complaint was her attorney of record

in the trial court and in the Illinois Supreme Court. The Illinois Supreme Court severely criticized him for acting in the dual capacity of attorney and witness. (R. 66.) His testimony (R. 22-52) dealt almost entirely with the presence of multiple dwellings in the area; a description of the commercial zone to the south of the plaintiff's property; and the identification of photographs of the property. His sole testimony regarding the "potentiality" of the property as a two flat was a brief sentence that "The top floor has one finished room, and there is an outside stairway leading up to that second floor." (R. 29.)

At the conclusion of the evidence the trial judge stated that the plaintiff was entitled to the relief sought in the complaint because "this property does abut or adjoin commercial property on Roosevelt Road within thirty feet thereof and that from all the facts and circumstances in evidence, it is the court's opinion that the Zoning Ordinance in question as to such premises does operate as a hardship and is invalid as to such premises."

The decree, in general, follows the allegations of the complaint in an abridged form. (R. 15-21.) In brief, it found that there was a commercial area immediately to the south of the plaintiff's property (R. 18); that there were multiple dwellings located in the same block as the plaintiff's property and in the surrounding area (R. 18-19); that there would be no substantial change in the structure or outward appearance of the property to complete the construction of an apartment on the second floor (R. 19); that the restrictions of the zoning ordinance to prohibit the use of the property as a two family residence are not necessary to secure adequate light, pure air and safety from fire (R. 19); that the ordinance as applied to the plaintiff's property has no relation to public health, morals or general welfare (R. 19); that the ordinance as applied to

the plaintiff's property is unreasonable and arbitrary; that the ordinance has denied the plaintiff the privilege of using the property as a two family residence; and that in so far as the ordinance deprived the plaintiff from using the property as a two family residence, it was unconstitutional. (R. 20.)

The Facts.

The opinion of the Illinois Supreme Court gives a painstaking recital of the facts. The Petitioner is not in serious disagreement with the facts found by the court. For that reason, the statement of facts which we hereinafter give is a summary of the facts in the opinion of the Illinois Supreme Court.

On September 21, 1921, the village of Oak Park adopted a comprehensive zoning ordinance covering practically the entire village. Petitioner owns lot 16, and 17 feet off the north side of lot 17, in block 14, in Austin Park subdivision. It is located on the west side of Lyman avenue. Lyman avenue extends north from Roosevelt Road. Roosevelt Road runs east and west. It is the south boundary line of the village of Oak Park. Austin Boulevard is the east boundary of the village. Austin boulevard is two blocks east of Lyman avenue. At a point 125 feet north of the north line of Roosevelt road, a 16 foot alley runs east and west, paralleling Roosevelt road. The first property in block 14 on the west side of Lyman avenue and north of the alley, is lot 18, and 8 feet off the south side of lot 17. Immediately north of this property is Petitioner's property, which is the north 17 feet of lot 17, and all of lot 16. The south line of Petitioner's property is 49 feet north of the south line of the alley. (R. 63.)

As platted, the lots south of the alley in block 14 extend north and south from the alley to Roosevelt road. This

tier of lots lying between the alley and Roosevelt Road extends from Austin avenue, which is the east boundary line of the village, to Harlem avenue, one mile west, which is the west boundary line of the village. This tier of lots is zoned as either commercial or industrial property. All of block 14, all of block 15 which is immediately east of block 14, the west half of block 16, which is east of block 15, and all of the property for several blocks north and west of block 14, except that portion lying between the east and west alley and Roosevelt road, is zoned as single-family residence property. In block 14 and block 15, however, there are three or four properties which are improved with two-family residences. These buildings were constructed, however, before the ordinance was adopted. (R. 63.)

Petitioner filed an application with the village authorities for a permit to remodel her home and make it into a two-family apartment building. This application was denied and the suit followed. Her property is an ordinary story-and-a-half residence, about 22 feet in width and extending back approximately 30 feet, a story and a half in height. Back of that is a one-story extension for some 12 feet to the west. The property fronts on the west side of Lyman avenue. The improvements contemplated in Petitioner's property involved the construction of a kitchen, bathroom and a bedroom on the second floor. One room on that floor was finished when the house was constructed. The improvements sought to be made also require cutting a dormer window through the south side of the roof and other internal changes so as to make the second floor a three-room apartment, consisting of a living room, bedroom, kitchen and bath. (R. 63-64.)

It was stipulated at the trial that at the time the zoning ordinance was adopted there were two two-family resi-

dences in the half block in which Petitioner's property is located. They are still so used. This half block consists of 18 lots, extending north from the alley already referred to. One of these two-family residences is about 125 feet north of plaintiff's property. The other is about 200 feet north of her property. Across the street to the east, in the west half of block 15, one of the multiple-family residences is located about 150 feet north of Petitioner's property and across the street, which is 66 feet wide. The other is practically at the extreme north end of the block. It is about 325 feet north of Petitioner's property and also across the street. It is also stipulated that both of these buildings were constructed prior to the passage of the zoning ordinance. The east half of block 16, which is the second block east of block 14, is zoned for industrial uses. Petitioner's witness also testified that at other points in the village, some distance from the block in which plaintiff's property is located, there are other properties in zoned residential districts devoted to multiple-family uses. He was able to point out, altogether, five such properties on Taylor avenue, which is a block and a half west of Petitioner's property, and a few others located at some distance from the block in which Petitioner's property is located. It is agreed, however, that there are only two two-family residences in block 14 north of the alley, and one or two in block 15. Petitioner claimed there were two, while the village record shows there is only one such property in block 15. (R. 65.)

The record shows further that in the east half of block 14, north of the alley, there are 18 lots, all of which, except the lot at the extreme north end of the block, are 25 feet in width. The north lot is somewhat wider. Five of these lots are vacant. Of the 31 improved lots, 17 are improved

with buildings on a single lot, while 14 contain buildings which are on parts of two or more lots. (R. 66.)

There was no proof in the record that the restrictions in the zoning ordinance are not necessary or are unreasonable to secure protection from fire, to insure adequate light and air, to conserve tax values or to prevent street congestion. Nor was there any proof in the record of diminution in the value of plaintiff's property because it is located in a residential zone. Nor was there any proof as to the effect which the conversion of her residence into a two-family residence would have on other property in the block. (R. 66.)

SUMMARY OF ARGUMENT.

I.

A.

A zoning ordinance of a municipality may validly forbid apartments or business buildings in residential areas.

Village of Euclid v. *Amber Realty Company*, 272 U. S. 365.

Zahn v. *Board of Public Works*, 274 U. S. 325.

The foregoing principle has been followed by state courts.

Sunny Slope Water Co. v. *Pasadena*, 1 Calif. (2) 87, 33 Pac. (2) 672.

Colorado Springs v. *Miller*, 95 Colo. 337, 36 Pac. (2) 161.

Strain v. *Mims*, 123 Conn. 275, 193 At. 754.

State Ex Rel Henry v. *Miami*, 117 Fla. 594, 158 So. 82.

Speroni v. *Board of Appeals*, 368 Ill. 568, 15 N. E. (2) 302.

Locatelli v. *Medford*, 287 Mass. 560, 192 N. E. 57.

Wippler v. *Hohn*, 341 Mo. 780, 110 S. W. (2) 409.

Romano v. *Ridgewood*, 14 N. J. Mis. R. 301, 184 At. 411.

B.

The complaint of the Petitioner filed in the trial court alleged that the ordinance was invalid (1) because of the presence of a commercial zone nearby and (2) because of the presence of other apartment buildings in the area.

Substantially all of the testimony offered in her behalf dealt only with those issues. The trial judge stated at the conclusion of the trial that he held with the Petitioner upon one of these issues.

The Petitioner has elected to abandon both of the foregoing issues in this court. She now relies upon an issue barely mentioned in her complaint and supported by but one sentence of testimony by her witness in the trial court.

The issue she raises here and dignified with such scant treatment in the trial court, is, to express her argument, that her home was "potentially" built for a two-apartment building when the zoning ordinance was passed; and that therefore she should be permitted to make such use of it now.

The physical condition of the house in question rebuts any possibility that it was designed for use as a two flat. Her contention is a mere subterfuge to evade the zoning ordinance. That her contention is a subterfuge is further supported by the fact that she occupied the house as a single family dwelling for 25 years after the passage of the zoning ordinance before making any effort to remodel it into a two flat. Had she considered the house a "potential" two flat, she would not have lost the advantage of 25 years rent from one of the apartments but would have converted the house to such use many years ago.

As a by-product of the foregoing argument, the Petitioner argues that the ordinance makes an unreasonable definition of a family. The same or substantially similar definitions of a family are found in zoning ordinances in all parts of the country where residential zones are created. Yet the Petitioner does not cite one case where such a definition has ever been found unreasonable by any court. Her further contention that the definition would not permit

a single family to have two kitchens is not supported by any reasonable construction of the ordinance.

C.

The authorities cited by the Petitioner do not support the issue she raises.

II.

The Petitioner Did Not Raise the Federal Question in the Trial Court or in the Illinois Supreme Court.

The complaint filed by the petitioner in the trial court did not specify upon which section of the constitution she relied. The decree of the trial court did not refer to the Constitution of the United States, directly or indirectly. The Petitioner has furnished no evidence that she argued a federal question in her brief in the Illinois Supreme Court. The Illinois Supreme Court did not refer to a federal question in its opinion. The petitioner's petition for re-hearing in the Illinois Supreme Court is in the record here. It did not mention a federal question. Upon familiar principles, the Petitioner may not now raise a federal question in the United States Supreme Court.

The burden is upon the party invoking the jurisdiction of the U. S. Supreme Court to make an affirmative showing that the federal question was raised in the state court.

Chicago, Ind. and L. R. R. Co. v. *McGuire,* 196 U. S. 128.

Where a court of review of a state court does not rule on a federal question, the U. S. Supreme Court will decline jurisdiction if the question was not raised in the trial court.

Mutual Life Ins. Co. v. *McGrew,* 188 U. S. 291.

Chicago, Ind. and L. R. R. Co. v. *McGuire,* 196 U. S. 128.

The particular clause in the U. S. Constitution and the rights claimed thereunder must unmistakably appear in the record of the proceedings in the state court.

Michigan Sugar Co. v. *Michigan,* 158 U. S. 112.

It is not sufficient to rely generally upon "the constitution of the United States."

Herndon v. *Georgia,* 295 U. S. 441.

A mere claim of denial of "due process" is insufficient.

Thomas v. *Iowa,* 209 U. S. 258.

Bowe v. *Scott,* 233 U. S. 658.

ARGUMENT.

I.

A.

A Municipality Has the Lawful Power to Enact a Zoning Ordinance Creating Residential Zones in Which Apartments and Business Properties Are Excluded.

Before discussing the merits of the Petitioner's contentions, let us refer briefly to the leading cases upon the authority of a municipality to exclude apartments and business properties from residential areas.

Probably the leading case upon the subject of the validity of zoning ordinances is *Village of Euclid* v. *Amber Realty Company*, 272 U. S. 365. That case, among other things, sustained the right of a zoning ordinance to forbid business buildings or multiple residences in residential zones. Subsequently, numerous state courts have held zoning ordinances valid which establish residential districts and forbid multiple family dwellings. Nearly all of the cases cite the Village of Euclid case and follow its principles. A few of these cases are the following: *Sunny Slope Water Co.* v. *Pasadena*, 1 Calif. (2) 87, 33 Pac. (2) 672; *Colorado Springs* v. *Miller*, 95 Colo. 337; 36 Pac. (2) 161; *Strain* v. *Mims*, 123 Conn. 275, 193 at 754; *State Ex Rel Henry* v. *Miami*, 117 Fla. 594, 158 So. 82; *Speroni* v. *Board of Appeals*, 368 Ill. 568, 15 N. E. (2) 302; *Locatelli* v. *Medford*, 287 Mass. 560, 192 N. E. 57; *Wippler* v. *Hohn*, 341 Mo. 780, 110 S. W. (2) 409; *Romano* v. *Ridgewood*, 14 N. J. Mis. R. 301, 184 at 411.

Subsequent to the Village of Euclid case, this court sustained the validity of a zoning ordinance of the City of

Los Angeles by the terms of which buildings for private businesses were excluded from residential zones. (*Zahn v. Board of Public Works*, 274 U. S. 325.)

B.

There Is No Merit in the Petitioner's Contentions and the Zoning Ordinance Was Not Unreasonable or Arbitrary.

As heretofore shown in the statement of the case, the principal issues at the trial of the case in the Superior Court of Cook County were whether the ordinance was invalid (1) because an adjoining area was zoned for commercial purposes and (2) because of the presence of certain multiple dwellings in the area in which the Petitioner's property is located. Substantially all of the testimony of the only witness for the Petitioner (who was also her attorney of record) dealt with those two issues. The oral statement of the trial judge at the conclusion of the case was that because of the first of the two aforesaid issues, the ordinance was invalid.

The Petitioner has abandoned those two issues in this court. She relies upon neither of them in either her petition or her brief. She now says that the two foregoing issues were not involved in the case. At p. 11 of her petition she says "Those were feigned issues and were not the contentions of petitioner." It is difficult to understand how the Petitioner has the temerity to make any such statement when (1) the two issues were raised in her complaint, (2) substantially all of the testimony given to support her complaint in the trial court dealt solely with them and (3) the statement of the trial judge at the conclusion of the case asserted that the ordinance was void because of one of them. She claims that the property was designed as a two apartment building in 1921; and

the sole issue she now advances is whether she may now convert the property into a two apartment building at this time. This issue was barely mentioned in her pleading in the trial court; and referred to in but one sentence in the testimony of her lawyer-witness.

The Petitioner asserts that the Illinois Supreme Court did not pass upon this issue. In that she is in error. The court did so and with logic that furnishes a complete answer to the merits of the Petitioner's argument. In disposing of the issue, the court stated in its opinion (R. 66-67) as follows:

> "It was contended by the attorney for plaintiff, in his testimony, and is so contended in his brief, that plaintiff's residence was architecturally designed for a two-apartment building when it was constructed prior to the time the ordinance was adopted. This contention, however, is not in any sense sustained by the evidence. The photograph of the residence in evidence shows that it is an ordinary one-and-a-half-story frame residence, approximately 22 feet wide by forty-two feet deep. It has a hip roof; the eaves come down to about the level of the second floor. The witness testified that at the time the house was built it had one room finished on the second floor with stairs leading to it from the entrance hall on the first floor. It has only one window in the front above the first floor, which appears to be an ordinary attic window. There is possibly a like window in the west end of the house, which does not show in the photograph. But to say that it was architecturally designed for an apartment on the second floor is not sustained by the record. It is simply an ordinary one-story residence with one room finished in the attic. According to the plans of the proposed reconstruction, in order to finish the balance of the attic so as to make it into suitable living quarters, it is necessary to cut a dormer window through the roof on the south side. That is the only way a window can be installed."

In addition to the foregoing, one of the strongest items of evidence that the Petitioner's property was not "potentially" designed for two family or multiple dwelling use is that the house was in existence in its present condition when the zoning ordinance was passed in 1921. (R. 2.) Yet it was not until shortly before this suit was filed in 1946 that the Petitioner decided to remodel the property as a multiple dwelling. It hardly seems possible that an owner of property would permit 25 years to pass without taking advantage of its "potentiality". One who erects a building with the intention of creating a two family dwelling is usually anxious to get the rent from both apartments as soon as possible. He does not suffer a loss of 25 years rent if his building is in truth and in fact a multiple dwelling which can be fitted for occupancy by two families by a small amount or remodeling.

Another factor which would lead any reasonable person to conclude that the property was never designed as a multiple dwelling are the extensive alterations that the Petitioner would have to make in order to provide for two family occupancy. Her complaint alleged that the permit she sought from the Village of Oak Park was to install a bedroom, bathroom and kitchen in the second floor, so that "the second floor could be used as a separate apartment". The necessity of making such extensive alterations as those negate any possibility that the property was ever designed for multiple dwelling use.

Almost any dwelling house can be converted into a two family dwelling by adding a bedroom, bathroom and kitchen on the second floor as the Petitioner has proposed here. In fact, large dwelling houses might be so converted into 3 or 4 family apartments.

To sustain any such contention as the Petitioner makes would lead to a complete circumvention of all zoning ordi-

nances. By means of the logic the Petitioner follows, any person with a one family residence in a residential zone might convert it into an apartment building for no other reason than it had four walls, a foundation and a roof. The most that can be said about the Petitioner's contention that her house is "potentially" suited as a multiple dwelling is that it has two floors, four walls and a stairway going from the first to the second floor.

It should be perfectly obvious to any person of common sense that the Petitioner's contention is barren of any real merit; and a mere subterfuge to violate the zoning ordinance of Oak Park by creating a two family family apartment out of an ordinary single family dwelling house. To quote the opinion of the Illinois Supreme Court, "But to say that it was architecturally designed for an apartment on the second floor is not sustained by the record. It is simply an ordinary one-story residence with one room finished in the attic."

As a by-product of the argument that the Petitioner's property is "potentially" suited for a multiple family dwelling, she makes the further argument that the ordinance makes an unreasonable definition of a family.

The definition of a family in the ordinance is, "any number of individuals living and cooking together as a single housekeeping unit."

Just how the Petitioner contends that the definition is unreasonable, she does not clearly state. She states at various places in her petition and brief that the necessary effect of the definition is to compel a family to cook in a single kitchen. For example, she says at p. 27 of her brief, "The question presented is whether under such a definition it is reasonable to restrict an ordinary American family group to one kitchen and require them all to cook together in order to use the residence and live in the dis-

trict." At p. 23 she asks whether or not "the restriction of one kitchen to a family" bears any reasonable relation to the police power.

Her argument fails because she reads something into the definition of a family that is not contained in it. There is nothing in the definition that provides that a family may use only one kitchen; and it is absurd to advance any such contention. Nothing in the definition of a family given in the ordinance says anything whatsoever about a single family being obliged to cook in one kitchen. It merely defines a family to be individuals "living and cooking together as a single housekeeping unit". What the Petitioner seeks is to create two separate apartments out of a single family dwelling. Her complaint avers that she applied to the Building Commissioner for a permit to install additional rooms on the second floor so that *"said second floor could be used as a separate apartment"* (R. 2-3); and that the outward appearance of the property will not be changed *"by the establishing of said three room apartment"*. (R. 3.)

Even though the definition of a family as set forth in the ordinance should be construed to limit a family to the use of one kitchen, the Petitioner would not be adversely effected. As just shown, what she is seeking from the Respondent by injunction is the right to convert her single family dwelling into a two flat. She does not seek to merely add a kitchen to her single family dwelling so that one family might use two kitchens. That is not the purpose of her injunction suit. What she seeks is an injunction to permit her to operate two apartments with complete and separate living facilities for two families; and not merely to add an additional kitchen for the convenience of one family.

The definition of a family in the Oak Park ordinance is

one in common use in zoning ordinances throughout the country. We will hazard a guess that the substance of the definition may be found in nearly every zoning ordinance creating residential zones. Yet the Petitioner does not cite a single case where such definition has been found unreasonable; or where it was construed to mean that a family might have but one kitchen. If the definition is so palpably unreasonable as the Petitioner claims it is, it is curious that in the scores of cases all over the country involving zoning ordinances, it never before occurred to counsel for any party to challenge its reasonableness.

In her conclusion that the ordinance prevents a family from having two kitchens, the Petitioner apparently relies upon an utterly false and erroneous construction of the case of *Harmon* v. *City of Peoria,* 373 Ill. 594. In her brief (p. 30) she quotes an isolated portion of the court's opinion consisting of dictum and then, without considering the context of the opinion, reaches her wholly unwarranted conclusion. An examination of the facts of that case show that the plaintiffs owned a two story house in a block in which more than one-half of the houses were used as multiple family dwellings or rooming houses. It was a typical "rooming house" block. The owners remodeled the second floor by adding two kitchens. As remodeled, the house was adapted for use as a three family dwelling. The owners intended occupying the first floor themselves and renting the two suites on the second floor to two couples. Considering the character of the majority of the other buildings in the block, the court held it was unreasonable for the city to forbid the owners to rent the two apartments on the second floor. The opinion clearly shows that what occasioned the court to hold the ordinance invalid was that the majority of the buildings in the block were already devoted to multiple dwelling or

rooming house use. In contrasting how the ordinance operated as applied to the plaintiff, the court pointed out (p. 373) that "the ordinance prohibits plaintiffs from renting their suites of rooms equipped with kitchen facilities to two couples" but it would not prevent any number of persons to occupy the house as a family and divide expenses, provided they lived as a solitary housekeeping unit with one kitchen. Manifestly what the court was doing was illustrating how unreasonable it was in this rooming house block to forbid the plaintiffs from renting out two small apartments with two kitchens to two couples, but to permit a large number of persons to share expenses and operate with but one kitchen; the prohibited use of two small apartments with two kitchens by two couples was to be contrasted with the permissible use of the same premises by a large number of persons living as one family with but one kitchen.

The court had no purpose or reason to say that a family might not have more than one kitchen any more than one bedroom or one bathroom or one dining room. There was no such issue in the case or anything that has the most remote connection with such an issue. The Illinois Supreme Court has never at any time placed any such construction upon the definition of the word family although scores of cases involving zoning ordinances have received its consideration; and so far as we can find, neither has any other court in this country.

C.

The Cases Cited by the Petitioner.

The Petitioner has cited the case of *Nectow* v. *Cambridge*, 277 U. S. 183. That case has no application to the case at bar; nor does it modify the law enunciated in the case

of *Village of Euclid* v. *Amber Realty Company* to the effect that a municipality may zone an area for residential purposes and forbid multiple family or commercial buildings in the area. In the Nectow case the facts showed a purely arbitrary classification whereby a large tract consisting of 140,000 square feet of land was placed in a residential zone without any reasonable basis whatsoever for the classification.

The petitioner has also cited the case of *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116. That case likewise has no application to the case at bar. Neither does it amend anything said by the court in the Village of Euclid case. In the Seattle Trust Co. case, a home for old people was located upon a five acre tract of land. The court held that it was arbitrary and unreasonable for the City of Seattle to deny the trustee of the home an application to replace the home with a larger one upon the same tract by requiring the trustee to obtain the written consent of two-thirds of the property owners in the area.

In the case of *Merrill* v. *City of Wheaton,* 356 Ill. 457, the court held a zoning ordinance unreasonable which precluded a property owner from building a two apartment building in a block where 50% of the buildings in use were two apartment buildings and in which block boarding houses were also permitted.

In the case of *Anderman* v. *City of Chicago,* 379 Ill. 236, a very small tract was zoned for residential purposes. It was isolated and completely surrounded by property zoned for commercial and apartment use. The court held it was unreasonable under such circumstances to zone the small tract for residential use.

A reading of these and other decisions of the Illinois Supreme Court show that the Illinois Supreme Court has always been zealous to protect property owners from harsh

and unreasonable restrictions of zoning ordinances; and that the court has never hesitated to give relief to a property owner suffering from the unreasonable restrictions of such an ordinance.

On the other hand, the Illinois Supreme Court has been equally zealous in enforcing the broad principles and objectives of zoning ordinances. It has not permitted the purpose of zoning to be frustrated by such subterfuges as the Petitioner has endeavored to employ here.

II.

The Petitioner Did Not Raise the Federal Question in the Trial Court or in the Illinois Supreme Court.

At no place in her complaint did the Petitioner employ the phrases "constitution of the United States", or "the United States constitution." At but one place in her complaint did the petitioner use the word "Federal." That was in Par. 11 of her complaint where she averred that the action of the Oak Park officials in refusing her a permit "is illegal and in total disregard of plaintiff's rights in her property, and in contravention and in violation of both the State and Federal Constitution." (R. 4.) *It is important to note that the Petitioner did not specify upon which section of the two constitutions she relied.*

Later in her complaint (Par. 24), she alleged that the ordinance "takes and damages property of plaintiff without due process of law, and denies to the plaintiff equal protection of the laws and is therefore unconstitutional and void so far as it so operates". (R. 9.) It is also important to note that there is no connecting language between the two widely separated paragraphs of the complaint just referred to.

The decree of the trial court, entered at the instance of the Petitioner, makes no reference whatsoever to the Constitution of the United States. It adjudged that the ordinance "is unconstitutional and void" but did not state that it was the United States Constitution that was violated.

The Petitioner has not filed in the record here a copy of the brief she filed in the Illinois Supreme Court. The opinion of the Illinois Supreme Court does not refer to the Constitution of the United States; and does not show any claim by the Petitioner that she relied upon the Constitution of the United States. The petition for rehearing she filed in the Illinois Supreme Court makes no claim that any right of hers guaranteed by the U. S. Constitution has been violated. (R. 72-88.)

Thus the entire record in the State Courts of Illinois (both in the trial court and the Supreme Court) is bereft of any claim that the ordinance violates any guaranty under the U. S. Constitution; unless it could be said that the Federal question was raised and preserved by the nebulous claims of constitutional guaranty found in the two aforementioned unrelated paragraphs of her complaint.

The burden is upon the party invoking the jurisdiction of the Supreme Court of the United States to make an affirmative showing by the record that the federal question was raised in the state court. (*Chicago, Ind. and L. R. R. Co.* v. *McGuire*, 196 U. S. 128.) Where the court of review of the state makes no ruling upon a federal question, the U. S. Supreme Court will decline jurisdiction if it appears that the question was not raised in the trial court. (*Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291-309; *Chicago, Ind. and L. R. R. Co.* v. *McGuire*, 196 U. S. 128-131.) In such case, in the absence of an affirmative showing to the contrary, the U. S. Supreme Court will infer that the question failed of decision in the state court because of its untimely

presentation. (*Chicago, Inc. and L. R. R.* v. *McGuire,* 196 U. S. 128-131.)

The particular clause in the U. S. Constitution and the rights claimed thereunder must unmistakably appear in the record of the proceedings in the state court. (*Michigan Sugar Co.* v. *Michigan,* 185 U. S. 112.) It is not sufficient to rely, generally, upon "the Constitution and the laws of the United States". (*Herndon* v. *Georgia,* 295 U. S. 441, 442, 443.) A mere claim of denial of "due process" without more is insufficient. (*Thomas* v. *Iowa,* 209 U. S. 258; *Bowe* v. *Scott,* 233 U. S. 658, 664, 665.)

Tested by the foregoing principles, the Petitioner did not raise or preserve the federal question in the state courts. The record is barren of the question having been raised in the Illinois Supreme Court in any form whatsoever, or of it having been preserved there if it was ever raised in the trial court.

Neither was the federal question presented in the trial court. The decree (entered by reason of the Petitioner having prevailed in that court) did not mention a federal question either directly or by the least inference; and certainly the pleadings filed by the Petitioner in the trial court did not sufficiently raise the question. She made no reference in her complaint to any particular clause of the Constitution of the United States. In the forepart of her complaint she alleged in general terms that the action of the village officials was "in violation of both the State and Federal Constitution." Under the decisions of this court, no federal question was raised by that allegation, the Petitioner having failed to specify upon which section of the Constitution of the United States she relied. Later in a far removed and unrelated part of the complaint, the Petitioner averred that the ordinance was unconstitutional

without averring to which constitution or to which section of either she referred.

We maintain that the Petitioner did not raise the federal question in the state court is conclusively established by the accumulated evidence of (1) the failure of the Illinois Supreme Court to mention it in its opinion, (2) the failure of the Petitioner to furnish evidence that she argued it in her brief in the Illinois Supreme Court, (3) the failure of her petition for rehearing to mention it, (4) the failure of the decree of the trial court to mention it, and (5) her failure to specify in her pleadings upon which section of the U. S. Constitution she relied. Had the Petitioner seriously intended to raise the federal question in the state courts, it would hardly seem possible that all five of the omissions just listed would have occurred.

It is true that there have been some cases, such as *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, where this court has held that the federal question has been raised by a general allegation in the trial court that a statute is "unconstitutional." However, those are exceptional cases where, although the constitutional question was raised in but general terms in the trial court pleading, the specific federal constitutional question was raised by counsel and passed upon by courts of review of the state.

In the Bryant case the court held that since the New York courts of review had passed upon the Fourteenth Amendment, the judgment of the highest court of that state might therefore be reviewed by the U. S. Supreme Court.

In the case at bar, the federal question was not passed upon by the Illinois Supreme Court; and so far as the record is concerned, there is no evidence that the Petitioner ever raised or argued it in the Illinois Supreme Court.

Wherefore the Respondent submits this its brief in

opposition to the petition for a writ of certiorari and prays that said petition be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 194

ANGELINE DEBARTOLO,

Petitioner,

vs.

VILLAGE OF OAK PARK, A MUNICIPAL CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

Believing that a few paragraphs directed toward clarification of the issues and questions discussed will be helpful to the Court, we make these suggestions:

I

The Court Has Jurisdiction to Review

The respondent Village while seeking to deny jurisdiction of this Court to consider this case has actually conceded it. It is stated on page 24 of the Brief of the respond-

ent Village that this Court has taken cases where a Federal question has been raised by a general allegation that a statute is unconstitutional. If so, jurisdiction exists here, where the allegation is *specific.*

The constitutional question was raised in this case in the trial court. That question of constitutionality is what the lawsuit was about. That was the very basis of the complaint, and the substance of the issue.

The complaint says (Tr. 4) that the action of the Village officials in denying plaintiff a permit to complete her building according to the plan submitted

> "is illegal and in total disregard of plaintiff's rights in her property, and in contravention and in violation of both the State and *Federal* constitutions."

Provisions of the Fourteenth Amendment of the Federal Constitution Are Directly Set Forth

Again in the Complaint (Tr. 9) it is alleged that the said zoning ordinance, insofar as it prohibits the use of plaintiff's house as a two-family residence,

> "takes and damages property of plaintiff without compensation, and deprives the plaintiff of her liberty and property without due process of law, and denies to the plaintiff equal protection of the laws, and is therefore unconstitutional and void insofar as it so operates."

The Court will note that the pleader had his eye on the Federal Constitution for that is the language of the Fourteenth Amendment, phrased to fit the allegation of unconstitutionality of the Ordinance, as interpreted and administered by the Village officials. The wording of the Fourteenth Amendment is

> "Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to

> any person within its jurisdiction the equal protection of the laws" (U. S. Constitution, Amendment XIV).

The Illinois Constitution of 1870 says nothing about denying "equal protection of the laws." Its Bill of Rights provides only against lack of "due process of law" (Illinois Constitution, 1870; Art. II, Section 2). So necessarily the complaint is based on the Federal Constitution.

The respondent Village in its answer to the Complaint denied that the Village officials in refusing to grant the requested permit acted

> "illegally and in contravention and in violation of both the State and Federal Constitutions" (Tr. 12, par. 11).

So the respondent Village knew the Federal Constitution was relied upon. And again in paragraph 24 of its answer the respondent Village denies that it takes plaintiff's property without due process of law.

In relying on such cases as *Zahn* v. *Board of Public Works*, 274 U. S. 325 and *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, it is obvious that respondent was attempting to meet the Federal question raised.

The Decree Holds the Zoning Law as Applied to Plaintiff's Property to Be Unconstitutional

The decree of the trial court finds "that all of the material allegations in the complaint in this cause have been proven" and adjudicates that the zoning ordinance, as applied to plaintiff's property, insofar

> "as it operates to deprive plaintiff from using her property as a two family residence is unconstitutional and void" (Tr. 20).

The complaint was not alone that the ordinance and its enforcement as to plaintiff's property was "invalid" but

that the *invalid enforcement* of the ordinance took plaintiff's property without due process and denied plaintiff the equal protection of the law. That was the claim of unconstitutionality then made and which raised the Federal question throughout the litigation.

The Supreme Court of Illinois reversed the decree. The effect of that judgment was to deny the claim of invalidity under the Federal Constitution. The cases cited in respondent's brief refer to writs of error. None involve restrictions by zoning ordinances, which, of their very essence, are an intrusion on the right to property and to the equal protection of the laws guaranteed by the Federal Constitution. Thus it is unnecessary to show further the erroneous conclusions sought by respondent to be drawn from those cases.

Nevertheless, it is to be noted that in *New York, ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 66, this Court says:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

From the showing in the case at bar, coupled with the absence from the State Constitution of an equal protection of the laws clause (as was noted by the Court in the *Bryant* case) it is apparent that the claim of invalidity by reason

of the restriction in the ordinance when applied to plaintiff's residence, as being repugnant to the Fourteenth Amendment, was presented to the Illinois Supreme Court, and that by its decision, it was upheld against that claim.

This Court will be clearly within its jurisdiction in granting certiorari to review this record.

II

Petitioner Is Not Now, and Never Was, Elsewhere, Urging That the Oak Park Zoning Ordinance Is Void Generally; Nor Is Petitioner Abandoning the Issues in Her Complaint That the Restriction in the Ordinance Is Void as Applied to Her Existing Building.

The cases cited by respondent deal with the general power to enact zoning ordinances (Respondent's brief, pp. 8-12). They do not require further reply as they do not involve particular restrictions, and their application to buildings existing before the ordinance was enacted.

The issue in this case is most clear. Petitioner is the owner of an existing building, in a fully built-up district, which has never been strictly devoted to one-family residences. (This is not the case of an owner of a *vacant lot*, in a strictly residential zone, seeking to erect on it what is generally understood to be a *2-apartment building*.) Petitioner *is permitted under the ordinance*, to complete as requested the available second floor space with the two additional rooms, and with dormer window, in accordance with the plan proposed. This is not denied by the Village. No problem is presented as to whether the upstairs is adaptable to the rooms as planned. Therefore, the reference by the Village (p. 14) to the Illinois Supreme Court's erroneous conclusion as to the *adaptability for the rooms* merits no reply here. That is not the matter in dispute. The only prohibition made by the restrictive provision of the or-

dinance and as thus construed and applied by the Village to the petitioner's building is that, one of the rooms, after completed as planned and allowed under the ordinance, may not be used as a kitchen. This, they say, is because the "cooking together" provision of the ordinance would otherwise be violated. What then is the issue? What is the *matter in controversy in this case* as to this specific residence, if it be not the prohibited use of one of the rooms as an *additional kitchen*? Nowhere has respondent attempted to justify the restriction as here applied, on any basis of public health, morals, safety or general welfare.

Opposing counsel say petitioner has abandoned supposed complaints, (1) that the ordinance was invalid because of nearness to a commercial zone, and (2) because of the presence of other apartment buildings in the area; but the respondent has not pointed out where in the complaint it is so stated. But there never were any such claims made in the complaint that the ordinance was void for such reasons, or for any other reason than that it was void *in the application of it to plaintiff's property.* Such matters were never abandoned for the simple reason that they were never asserted. Those matters were evidentiary only and incidental to the picture. The supposed contention would only exist if there was an attack on the general ordinance and if there was in question the right to zone the area; and the complaint would be applicable to every piece of property in the area.

The petitioner does not assert, and never has asserted, that the zoning ordinance is void generally. It would be idle to advance such propositions as controlling under the contention that petitioner's rights were being taken under the guise of the police power by denying her a permit to finish the upstairs of her building with a kitchen, while the two rooms, as planned, are admittedly allowed. It is the denial of permission to complete her house so as to accommo-

date the persons, permitted under the ordinance, that is the burden of petitioner's complaint. The construction of said ordinance by the Village is in effect and in reality a prohibition against the extra kitchen. This, she alleges, is the taking of her property in violation of the Federal Constitution. That is the proposition urged here, and the only one ever urged.

Petitioner is not seeking to rezone her property. She asked for a permit to finish the building with the extra kitchen on the theory it was her right. The building commissioner denied the permit. The zoning board was appealed to and it denied the request. The Village Board of Trustees supported the officials, and this suit to compel a permit was then filed.

It has been consistently urged that the acts of the officials were so arbitrary and unreasonable as to destroy petitioner's right to a legally permissible use of her property and that such construction of the ordinance violated both Federal and State constitutions.

That proposition has been continuously urged. That proposition has never been abandoned. That proposition is still the basis of this certiorari application. This is the kind of case contemplated in the decision of *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 397, where this Court stated that while it was determining that the general ordinance there involved was a valid exercise of authority, it was "*leaving other provisions to be dealt with as cases arise directly involving them.*"

The case at bar is the first case to reach this Court involving the "cooking together" restriction as applied to an existing building; it is in this that the Village goes too far, namely, *where the only matter in controversy* is the right to have *an additional kitchen.* Nothing more was shown to be involved in this case.

III

The Complaint, and the Decree of the Trial Court, Reflects That the Attack Upon the Ordinance Is Only as to Its Application to Plaintiff's Property, and That the Ordinance Was Not Attacked Generally.

The contention of the respondent Village that the principal issue tried concerned the commercial zoning of adjoining territory, and the presence of multiple buildings in the area in question, is wholly without foundation. There was no such issue formed or tried. It is a feigned issue used to divert argument away from the real issue, the taking of plaintiff's property rights by denying the right to complete her building with a kitchen upstairs. The Village attempted to thus make of the case at bar a wholly different case on the appeal, in order to make it fit the rules concerning the general power to zone *vacant* areas. This was pointed out to the Illinois Supreme Court, and in the Petition for Rehearing. That contention, by the Village, caused the Supreme Court of Illinois to err in its decision, as is evident from the opinion of said Court in this record.

There is no such claim of invalidity made in the complaint. The complaint is based upon the refusal of the Village to give a permit to complete the building because the plans included a kitchen so as to accommodate a second family unit. That is the only charge of invalidity or unconstitutionality.

While there are allegations in the complaint descriptive of the zoning area in question and adjoining areas, it is not alleged that the zoning ordinance is invalid for those reasons. Those allegations merely accentuate and emphasize the unreasonableness of the Village in the position it takes with reference to the proposed use by petitioner of her existing home, in that the Village says, in effect, that the

use of one of the permitted rooms as a kitchen would violate the "single housekeeping" and "cooking together" restrictions in the ordinance and, they state, would "destroy the neighborhood" (Tr. 14).

The substance of the complaint is reflected in certain paragraphs of the complaint which for certainty we quote:

> "16. That by said zoning ordinance, the defendant, although it does not limit the number of rooms, or the number of persons that may occupy a single structure, the Village of Oak Park is attempting to, and compelling plaintiff, to restrict use of said property to 'only one family' " (Tr. 6).
>
> "17. That the word 'family' is defined in said zoning regulations, Section 35.09 (26) as follows:
>
> " 'A family is any number of individuals living and cooking together on the premises as a single housekeeping unit' " (Tr. 6).
>
> "24. That the said zoning ordinance, insofar as it prohibits the use of plaintiff's real estate as a two-family residence, as aforesaid, takes and damages property of plaintiff without compensation, and deprives the plaintiff of her liberty and property without due process of law, and denies to plaintiff equal protection of the laws and is therefore unconstitutional and void insofar as it so operates" (Tr. 9).

The prayer of the complaint is that the officials be required to issue a permit to finish the upstairs as a separate apartment; that the officials be enjoined from enforcing the said ordinance insofar as it prohibits the use by petitioner of *her house as a two-family dwelling;* and for an adjudication that the zoning ordinance is invalid and void "in its application to this property" (Tr. 10).

The decree of the trial court specifically adjudicates that it is the denial of the right to finish the building as requested

that creates the unconstitutionality of the ordinance. We show the provisions of the decree.

The decree (Tr. 15-21) specifically finds as follows (Tr. 19, par. 8):

> "8. The court further finds that there will be no material or substantial change in the plaintiff's property structure or outward appearance, in allowing plaintiff to complete the construction of an apartment on the second floor of her property at 1181 S. Lyman Avenue, Oak Park, Illinois; and, while it will enhance the value of the property of plaintiff, and improve the same to its highest and best purpose and urgent need, it will not in any wise or manner affect the character of the neighborhood, or decrease the value of the premises nearby or in the vicinity."

And in paragraph 9 (Tr. 19) the decree finds that the restrictions enforced upon plaintiff's property by the respondent Village, prohibiting the use of *her house for two families.*

> "are not necessary to the end that adequate light, pure, air, safety from fire, and other dangers may be secured."

The decree then adjudicates that the said zoning ordinance operates to deprive plaintiff of using her house for two families and is therefore

> "unconstitutional and void, and therefore the same is invalid and of no effect in law in its application to plaintiff's property" (Tr. 20).

The court then enjoins the enforcement of the ordinance as against the plaintiff's property and directs a permit be given allowing the completion of the building (Tr. 20-21). From this condition of the record it can be seen that the Supreme Court of Illinois based its opinion upon an erroneous conception of the issues in the pleadings.

In the petition for rehearing filed in the Supreme Court it is pointed out to the Court that the Court had decided the case upon an immaterial issue, feigned by the respondent Village, and that there was really "only one question for consideration" and that was whether the plaintiff had a right to complete her house and whether the denial of such right by enforcing the restrictive provisions of the ordinance *as to one kitchen* "was unreasonable, discriminatory, and therefore unconstitutional" (Tr. 76-77).

The Supreme Court of Illinois in upholding the ordinance, necessarily held that its enforcement against plaintiff's property was not unconstitutional, and did not deprive plaintiff of her property without compensation, nor deprive her of her right to the equal protection of the law; and did not deprive plaintiff of her rights under any constitution, Federal or State, as alleged and claimed by respondent Village.

By putting the decision upon a supposed issue which was not in the case the Supreme Court did not dispose of the case on local law for it never was the issue that the ordinance was "invalid" generally, but always that its enforcement took petitioner's property without compensation and without due process of law, and denied to plaintiff the equal protection of the laws.

IV

Unnecessary and Unreasonable Restrictions Upon Family Life Cannot Be Justified Under the Guise of Police Power.

We think the respondent Village concedes the point made that the zoning of residential territory by restrictions upon family life and its conveniences *inside the residence*, is arbitrary, and unreasonable when enforced so as to deprive a family of the usual conveniences of American life; that

is to be deduced from the claim of the Village that the Supreme Court of Illinois has never decided that a family *may not have* more than one kitchen in a one-family dwelling "any more than one bedroom or one bathroom, or one dining room" (Brief of Respondent, page 19).

True, the Supreme Court of Illinois has never so decided, *but* it has decided the very *converse* that where a building in a one-family zone is adaptable to more than one family unit, and so allowed to be used under the ordinance, it is unreasonable to restrict the building to one kitchen for the "family" group where the ordinance defines a family as "any number" of persons living and cooking together on the premises (*Harmon* v. *City of Peoria*, 373 Ill. 594). Respondent says that in the *Harmon* case it was a typical "rooming house" block. But we have shown that the provision of the ordinance as to roomers in that case, and the case at bar are identical. Under the ordinance, plaintiff's property is in just as typical a "rooming house" block. We have shown in the petition, the basis of the Court's holding in that case, as also the other cases, so that it is unnecessary to repeat it here.

Where can there be a violation of the zoning ordinance, *if it is now conceded that two kitchens are permitted,* when the residence building is used inwardly for the very purposes indicated by its outward appearance, *and the ordinance prohibits nothing else sought to be done by petitioner?*

The petitioner's building, under the proposed use, will *still be a residence* with rooms upstairs. That the three rooms with the kitchen, now conceded within petitioner's rights, might be referred to as a separate apartment, will not make of the structure what is commonly known as a two-apartment building. Nor has it been claimed or shown that any question of light or air, or any other element is

here involved, pertaining to the public welfare—the basis and support of zoning restrictions, and as might well be the situation in the erection of a *two-apartment building on a vacant lot.*

Of course all members of the family, regardless of the hardship imposed, may be able to convenience themselves with one kitchen, and so appease the Village fathers, but how much more convenient, necessary and rightful is it, to have an extra kitchen, when no one is in fact harmed. It is the same group living in the same house, extra kitchen or no extra kitchen.

Certainly there is no discernible relation between such restriction and the police power.

Obviously the zoning of territory to be built up with dwellings arranged and designed for the exclusive use of only one "family" being "any number of individuals living and cooking together on the premises as a single housekeeping unit" is unreasonable *when the test applied* depends *only* upon whether those "any number" of persons can have more than *one kitchen in which to cook;* for whether such a family breaks up into separate units, or family groups, inside the house, and cooks and eats separately, or, collectively, cannot concern the Village officials. The definition is: "any number of individuals", and, naturally one would suppose such a family, more or less, is entitled to the usual family conveniences.

Counsel for the respondent Village say that the Illinois Supreme Court has never at any time placed the construction of unreasonableness upon the creation of one-family residence zones, with kitchen facilities as the test of a one-family residence. It is not contended that it was so decided, as to the *creation of the zone,* but definitely the Supreme Court of Illinois has passed upon that question three times, in its application to *a specific existing building* in the area.

That point was definitely decided by the Illinois Supreme Court in *Harmon* v. *City of Peoria,* 373 Ill. 594 where it was held that under the same definition of "family" that three kitchens for three family units, in a building in a one-family residence zone, was no more inimical to public welfare than the same or greater number of persons permissible under the definition, living collectively with one kitchen. The same ruling was made in *Merrill* v. *City of Wheaton,* 356 Ill. 457, where that question only was presented, and *Anderman* v. *City of Chicago,* 379 Ill. 236.

The *zoning* of the territory was not held void in those cases, but as applied and enforced as to houses existing before the enactment of the ordinance, the Supreme Court of Illinois definitely said that an ordinance which permits an unlimited large group of people to live under one roof, and yet does not permit them to break up into family units *with a kitchen* for each group, is arbitrary and unreasonable; that is, when it restricts the grouping of separate units for family life.

In other words, the Supreme Court of Illinois has said that, where there is a building existing before the ordinance, in a one-family building zone, so constructed and allowed to be used for more than one family unit, and the number of persons who may live in it is unlimited, it is unreasonable to deny the normal use of the house for separate family units *by applying the "one-kitchen-to-a-family"* test. (*Harmon* v. *City of Peoria,* 373 Ill. 594). Counsel has not been able to show one case, and apparently none exist, in which was involved the application of a like ordinance to an existing building, where it was decided otherwise, by the Illinois Supreme Court, or in any other jurisdiction, or by this Court.

Opposing counsel say that there is nothing in the ordinance that says that "a family may use only one kitchen"

or a "single family being obliged to cook in one kitchen" (Respondent's Brief. p. 17). The ordinance says "cooking together." That provision has been interpreted by the Illinois Supreme Court in the cases cited, as "using a single kitchen for their needs." Moreover, the Village officials denied the permit because in the application and sketch there appeared a kitchen to be used with other rooms in the upstairs section, which is admittedly allowed to be used to accommodate a second family unit; so whether that language in the ordinance is susceptible of any other meaning or not, the Village officials by their construction of the ordinance, so apply it in the case at bar. If the "one kitchen" rule had not been thus applied by the officials there would have been no lawsuit. For there never was a denial, and there is no denial, of the right to complete the upstairs into rooms for living quarters. The ordinance does not prohibit it, and the respondent has nowhere denied it although we alleged it throughout this suit, and in this petition for certiorari before this Court (P. 30).

Surely it can be of no concern to the police power, or the Village fathers, just how the family shall dispose itself inside the building arranged with two kitchens, whether one group detaches itself and takes the upstairs portion or lives collectively with the others.

So what can be the difference, as affecting the public welfare, between a family group, living in a building with one kitchen and the same persons arranging themselves into two family groups, one upstairs, one down, with two kitchens?

No objection is now made to two kitchens for a family group, as we understand opposing counsel; what is objected by the Village is that the group must not separate itself in units and one group move upstairs and use the new kitchen while the other group remains on the ground

floor and uses the other kitchen. In other words they now say there must be a continuous intermingling of the persons, otherwise the public welfare will be endangered, and those persons may be unlimited in numbers—total strangers, roomers and boarders.

Speaking concretely the Village has no objections to building the extra rooms, and none to the daughter and son-in-law living in the house with the mother; but the objection is that the mother may not separate the use of the upstairs rooms, by there providing kitchen facilities; and shall not permit the new family unit to have the privilege of cooking, eating and housekeeping upstairs by themselves.

And that restriction is imposed by the Village officials under guise of the police power.

The Supreme Court of Illinois said in *Harmon* v. *City of Peoria,* 373 Ill. 594, that three separate kitchens was allright even to rent to strangers where, as here, no other prohibition was shown; but here, where the building and the ordinance will permit a separate unit upstairs, a permit is denied for the use of petitioner's daughter, and her ex-soldier husband, because a kitchen is to be installed as one of the rooms, *and for that reason only;* and that, too, where a kitchen was permissible in 1921, and this building was then in existence as now, when the ordinance was passed. *Of course the zoning ordinance did not and could not destroy that right.*

Under any view the action of the Village, through its officials, is wholly unreasonable and arbitrary and destroys a valuable property right in which petitioner should receive protection. The protection of that right to complete the building with the kitchen was claimed under the Federal Constitution and denied, and this Court has jurisdiction to right that wrong.

V

Petitioner's Claim Is That the Application of the "Family" Definition to Petitioner's Building Existing Before the Enactment of the Ordinance Is Arbitrary, Unreasonable and Confiscatory.

Opposing counsel say that the definition of a family as used in the Oak Park ordinance is one commonly used throughout the country in creating residential zones in zoning ordinances, and say that no case is cited by petitioner deciding that such a definition of a family is unreasonable.

The contention of petitioner is not that the ordinance definition of a family, artificial as it is, is unreasonable, nor even unworkable, as it may pertain to the erection of buildings after the enactment of the ordinance, and to control the height and width of new structures in zoned vacant areas, to be devoted strictly to one-family residences, and thus "creating" residential zones.

The complaint is that the application of that definition by the Municipal officers to houses found in single family zones, and existing before the ordinance, permitted and adaptable to the use of two or more ordinary every day American families, as we know them, is unreasonable when, as here applied, the restriction *is only against an additional kitchen,* and thus destructive of property rights.

It is that refusal by officials to permit the separation of the unclassified and unlimited number of persons, within the existing house, so as to make a reasonable use of the permitted interior arrangement of the house, that makes the ordinance unreasonable.

We assert that the application by municipal officials of such definition to houses adaptable and permitted to be used by two or more families, found in the one-family size, when the zone is created, whereby the officials refuse to per-

mit, in such a house, the installation of cooking facilities, for the separate ordinary and permissible family units, has been condemned by the Illinois Supreme Court in *Harmon* v. *City of Peoria,* 373 Ill. 594, *Merrill* v. *City of Wheaton,* 356 Ill. 457, and *Anderman* v. *City of Chicago,* 379 Ill. 236. If such artificial classification does not fit existing conditions, the ordinance must give way.

A zoning ordinance is a most general thing in its applications to property, and the power to zone the territory, and control the height and size of buildings, after the ordinance, has no relation to the regulation or distribution of family life and its conveniences inside the house. Opposing counsel say that the reasonableness of the restriction, in common use throughout the country, has never been challenged (Resp. brief, p. 18). The inference, as pertaining to the case at bar, is that local officials are everywhere applying and enforcing it, as to all existing buildings, found in the territory, when the ordinance is enacted; and that as here applied by the Oak Park officials, namely—, *a prohibition against another kitchen* (for nothing else is prohibited in this case) *it is thus being applied everywhere.*

If that is so, then the question here presented as to whether the local officials *have not gone too far,* under the guise of police power, and whether the restriction as here complained of, is not repugnant to the 5th and 14th amendments, is obviously of great public concern. This question does not appear to have been heretofore passed upon by this Court, as respondent admits. Zoning cases which have been considered by this Court have involved the *general power* of the municipality to enact them, *in the zoning of an area.* (*Euclid* v. *Ambler Co.,* 272 U. S. 365). This case involves the validity of a restriction in the general ordinance, as applied by local officials to a specific existing building, in the area zoned. It is such a question as was

specifically reserved in the decision of the *Euclid* case (*Euclid* v. *Ambler,* 272 U. S. 365, 395-7).

The great importance of this Federal question is thus conceded, and the reason for this Court taking this case for decision is thus given additional emphasis.

We do not deem necessary, at this time, to point out to this Court, the many erroneous statements and conclusions of counsel for respondent, such as "that she occupied the house as a single family for 25 years" (Resp. brief P. 9); and other such statements, without any basis in the record therefor; and that, even if it were so, it would have no bearing on petitioner's claim for her Constitutional right.

It is necessary only to note that in other such instances where respondent makes such assertions, and chooses to state what the petitioner contends, there is a decided absence of any reference to the record where such facts or contentions are to be found.

Respondent sets out certain excerpts from the opinion of the Illinois Supreme Court in this case, and adopts them as "the facts". But, it is that opinion, and the judgment of said court, which this Court is here respectfully and earnestly asked to review. Nor, does counsel for respondent refer to such facts as—that within the year, prior to the suit, the Village board granted permits for use as separate apartments, in respondent's District "A" in seven instances, according to the record of the Village; to which respondent replied as being "irrelevant and immaterial", (Tr. 8, 14 Par. 23)—and other such facts not apparent in the opinion.

To what inconsistency, respondent's counsel has been led by the attempt to explain the cases cited by petitioner, is clear, when we note that respondent explains that the unconstitutionality was upheld in the *Anderman* case because the *tract was small,* and in the *Nectow* case, because the *tract was large.* (Resp. brief P. 20).

Counsel says that the testimony of one of the attorneys dealt almost entirely with the presence of dwellings and zones, to identify photographs, and that for this, the Illinois Supreme Court criticized him (Resp. brief P. 3). It is admitted then, that said testimony consisted of making formal proof of undisputed physical facts (Tr. 87). Other facts were stipulated. The provisions of the ordinance were before the Court. We find no prior case, where an attorney was thus criticized for making formal proof of this nature. Surely counsel does not infer that the attitude of the Illinois Supreme Court in this connection was any element in the reversal by it of the decree, and thus denied to petitioner the rights claimed by her and guaranteed to her under the Constitution of the United States.

VI

The Respondent Village Has Not Justified the Interpretation of Its Ordinance Whereby it Places Restrictions Upon Family Life.

It is suggested that the answer of the Village does not in any wise justify the zoning of its territory by restrictions upon family life or such application of its ordinances. For all that is said in defense of its application of its ordinances, it yet remains obvious that instead of promoting general welfare, health and morals, the application of its ordinances by the officials, as shown in this case, actually and in reality, restricts the general welfare, by allowing large unclassified groups to live as one family if they use one kitchen, but denying to the ordinary family of a few persons a permit to arrange separate housekeeping rooms for a new family unit of daughter and son-in-law, where the house existed when the territory was zoned; and where no other prohibition as to the rooms is claimed by the Village, or reason for refusal of the permit.

Public Convenience Is Involved

It is respectfully suggested that the present housing shortage could be largely relieved if a realistic, instead of an aesthetic approach, were made to the zoning problem. The time is passing where a municipality may compel life in a residence by a single family, if it ever could have done so. This, the Village understands it cannot do—the ordinance itself cannot and does not prohibit it—so they decide in this case, *they just won't let them have a kitchen.*

Space readily available in many houses can be used to accommodate additional family units, such as members of the family, upon marriage—daughters and sons, ex-service men, who are anxious to have their own modest quarters; and this without danger to the public welfare, or violating proper zoning ordinances.

It is suggested that public convenience will be promoted if this Court will consider the problem here presented.

Conclusion

We respectfully suggest that the question here presented is one which is as broad as the country, as opposing counsel admits; and one of which the Court should take jurisdiction to certify up for review, which is earnestly requested.

Respectfully submitted,

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